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Supreme Court, U.S.
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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

SOUTHERN MANUFACTURED HOMES, INC.
and HORTON HOMES, INC.,

Petitioners,

v.

SCOTT BROOKS,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Alabama

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether a document entitled "Certificate of Quality Assurance," which was delivered with a manufactured home and which contains language that reads "Your new home has been carefully inspected to ensure quality and cleanliness" and "Built for a Lifetime!" is a "written warranty" within the meaning of the Magnuson-Moss Warranty Act.

II. Whether a prevailing plaintiff under the Magnuson-Moss Warranty Act may recover attorney's fees and costs related to the pursuit of unrelated claims, where the Plaintiff's fee request did not designate what portion of time was spent on Magnuson-Moss related claims, and where the trial court made no findings whatsoever in support of its granting the entire fee request.

III. Whether the award of punitive damages in this case violates the Due Process Clause of the Fourteenth Amendment, where neither the trial court nor the Supreme Court of Alabama engaged in any sort of *meaningful* review of the award.

CORPORATE DISCLOSURE STATEMENT

Petitioner Southern Manufactured Homes, Inc. has changed its name to Dynasty, Inc. Dynasty, Inc. is a wholly owned subsidiary of Horton Industries, Inc. Horton Industries, Inc. is a privately held corporation and there is no publicly held corporation that owns 10% or more of the corporation's stock.

Petitioner Horton Homes, Inc. is a wholly owned subsidiary of Horton Industries, Inc. Horton Industries, Inc. is a privately held corporation and there is no publicly held corporation that owns 10% or more of the corporation's stock.

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OPINIONS BELOW

The opinion of the Supreme Court of Alabama which the petitioners are asking this Court to review is *Brooks v. Horton Homes, Inc. and Southern Manufactured Homes, Inc.*, No. 1000346, 2001 WL 1520623 (Ala. Nov. 30, 2001), as set forth in Appendix A. The initial opinion of the Supreme Court of Alabama which was withdrawn on applications for re-hearing and superceded by the November 30, 2001 Opinion of the Supreme Court of Alabama is *Brooks v. Horton Homes, Inc. and Southern Manufactured Homes, Inc.*, No. 1000346, 2001 WL 792730 (Ala. Jul. 13, 2001), as set forth in Appendix B.

JURISDICTIONAL BASIS

This petition asks this Court to review the November 30, 2001, Opinion and Judgment of the Supreme Court of Alabama. Should the Court grant this petition, it would have jurisdiction pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED IN THE CASE

15 U.S.C. § 2301

15 U.S.C. § 2303

15 U.S.C. § 2308

15 U.S.C. § 2310

Pursuant to Rule 14.1(f), *Rules of the Supreme Court of the United States*, the text of these statutes are set forth in Appendix C.

STATEMENT OF THE CASE

This case arises out of the Plaintiff's purchase of a manufactured home. In August, 1997, Scott Brooks ordered a manufactured home from Factory Direct

Homes[1] in Montgomery, Alabama. The home that Mr. Brooks ordered was to be manufactured by Horton Homes, Inc. for Southern Manufactured Homes, Inc.[2] At the time that Mr. Brooks ordered the home, Factory Direct Homes was an authorized dealer of Southern Manufactured Homes, Inc. In September, 1997, Mr. Brooks' home was delivered to his lot in Elmore County, Alabama, by Defendant George Morgan.[3] The home was set up and Mr. Brooks and his family moved into the home around the first of October, 1997.

The home came with a limited one-year warranty which states in pertinent part as follows:

> Horton Homes, Inc. makes the foregoing warranty expressly IN LIEU OF ANY OTHER EXPRESS OR IMPLIED WARRANTY, INCLUDING ANY IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS, WHICH IMPLIED WARRANTIES ARE HEREBY EXPRESSLY EXCLUDED, and expressly in lieu of any other obligation on the part of the manufacturer.

(App. D, 21d-22d) (emphasis in original). Horton Homes had an agreement with the dealership that the dealership

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[1] Factory Direct Homes is referred to throughout this petition as "the dealership."

[2] Horton Homes, Inc. and Southern Manufactured Homes, Inc. are essentially the same entity, Southern Manufactured Homes, Inc. simply being a different brand name for Horton Homes, Inc. (R.434-35). For purposes of this case they have been treated as one in the same. Thus, throughout this petition they will be referred to collectively as "Defendants," "the Defendants," "these Defendants," "the Horton defendants," "Horton Homes," and/or "Horton."

[3] Defendant Morgan had no legal affiliation whatsoever with the Horton defendants. Defendant Morgan was an independent contractor hired by the dealership to install the home.

would provide all warranty work on the homes it sold. (App. D, 22d).

In addition to the limited one-year warranty, the home was delivered with a "Certificate of Quality Assurance" which had been placed in the home by Horton. The certificate included the statement "Your new home has been carefully inspected to ensure quality and cleanliness," and included the phrase "Built for a lifetime!" The certificate had been signed by the cleaning crew for Horton. (App. F, 1f).

After moving into the home, Mr. Brooks began to experience various problems with the home, which he reported to the dealership. The dealership corrected some of the problems with the Plaintiff's home; however, some of the problems that the Plaintiff complained of were not corrected to his satisfaction. Sometime during the Spring of 1998, Factory Direct Homes went out of business. Thereafter, in May of 1998, Mr. Brooks contacted Horton directly regarding various problems he continued to have with his home. On two separate occasions, Horton sent crews to the Brooks' home to make the necessary repairs. However, for various reasons, the crews were unsuccessful in completing the requested repairs within Mr. Brooks' time frame.

On July 14, 1998, only approximately two (2) months after first contacting Horton directly, Mr. Brooks filed the instant lawsuit in the Circuit Court of Elmore County, Alabama. The Plaintiff's original complaint included nine causes of action against the Horton defendants. (App. D, 1d-11d). The Plaintiff later amended his original complaint to add three counts against defendant George Morgan. (App. D, 12d-16d). The Plaintiff later amended his complaint a second time to add three additional counts against the Horton defendants. (App. D, 17d-20d).

Defendants filed answers to Plaintiff's complaint wherein they denied all material allegations of the Plaintiff's complaint and raised constitutional defenses to the potential award of punitive damages. (App. E, 1e-11e).[4]

The case was tried to a jury in June of 2000. Only four (4) counts were ultimately submitted to the jury – they were: Count I – Breach of Express Warranty, Count II – Breach of Implied Warranty, Count III – Violation of the Magnuson-Moss Warranty Act, and Count VII – Wanton Repair. All other counts were either withdrawn by the Plaintiff during the course of the trial or were dismissed by the trial court. The jury returned a general verdict in favor of the Plaintiff awarding compensatory damages in the amount of $150,000 and punitive damages in the amount of $600,000. (App. K, 2k). The jury also made a specific finding that the Horton defendants violated the Magnuson-Moss Warranty Act. (App. K, 1k). The trial court entered judgment on the jury verdict.

Thereafter, the Plaintiff filed a motion for the award of attorney's fees in the amount of $34,612.50 and costs in the amount of $5,340.43. The Plaintiff's fee request sought attorney's fees and costs for *all* time and expenses related to the case, which consisted of time spent on *all* claims, both successful and unsuccessful, against *all* defendants. The Plaintiff's attorney's billing ledger, which was submitted as an exhibit to his motion, gave only a very generalized accounting of his billing activities and did not designate time spent on specific claims. (App. G, 1g-5g).

Horton filed a post-trial motion in which Horton argued, as to the breach of implied warranty claim, that the trial court erred in submitting the implied warranty

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[4] Only the answer of Horton Homes, Inc. is reproduced in the appendix. Southern Manufactured Homes, Inc. filed a separate answer wherein they raised identical constitutional defenses.

count to the jury on the basis that Horton properly disclaimed all implied warranties in its limited one-year warranty. (App. H, 3h). As to punitive damages, Defendants argued that the award was excessive and again raised and expounded upon the constitutional defenses raised in their answers. (App. H, 7h-13h).

On October 10, 2000, the trial court conducted a hearing on all pending motions which included Defendants' post-trial motions as well as Plaintiff's motion for attorney's fees and costs. During oral argument as to punitive damages, counsel for Defendants specifically argued that the trial court should apply the factors set forth in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996) and *Green Oil Co. v. Hornsby*, 539 So. 2d 218 (1989) in eliminating or reducing the punitive award.[5] During oral argument as to Plaintiff's fee request, counsel for Defendants specifically objected to Plaintiff's request on the grounds that the Plaintiff should not be entitled to recover attorney's fees and costs related to the unsuccessful pursuit of unrelated claims, and that the Plaintiff should not be entitled to recover attorney's fees and costs related to the successful pursuit of unrelated claims which themselves did not carry the potential award of attorney's fees and costs. (App. I, 1i-3i).

On October 11, 2000, the trial court entered an Order simply denying Defendants' post-trial motions and granting Plaintiff's motion for attorney's fees in full. (App. J, 1j-2j).

Thereafter, these Defendants appealed to the Supreme Court of Alabama.

On July 13, 2001, the Supreme Court of Alabama issued its initial opinion in this case wherein it affirmed the judgment of the trial court conditioned upon the

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[5] In its opinion, the Supreme Court of Alabama specifically held that Horton properly challenged the constitutionality of the punitive damage award as being a denial of due process under the Fourteenth Amendment.

Plaintiff's agreement to accept a remittitur of punitive damages in the amount of $450,000 (meaning the total punitive damage award the court affirmed was $150,000). (App. B, 1b-37b). Thereafter, these Defendants and Plaintiff Scott Brooks each filed petitions for re-hearing with the Supreme Court of Alabama. On November 30, 2001, the Supreme Court of Alabama issued its second opinion in this case wherein it withdrew its first opinion and denied Defendants' and Brooks' petitions for re-hearing. (App. A, 1a-35a).

As to the implied warranty issue, the Supreme Court of Alabama held that the "Certificate of Quality Assurance" was a "written warranty" within the meaning of 15 U.S.C. § 2301(6), and thus, Horton's disclaimer of implied warranties was ineffective under 15 U.S.C. § 2308(a). (App. A, 5a-9a). As to the issue of attorney's fees, the court held that Horton bore the burden of objecting to specific items or charges for work that it considered improper, and by failing to raise such specific objections, the trial court was thereby authorized to treat the Plaintiff's fee request as uncontroverted. (App. A, 19a-20a). As to the issue of punitive damages, the Supreme Court of Alabama, following this Court's lead in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001), adopted a *de novo* standard of review of punitive awards. The court then reduced the punitive award from $600,000 to $150,000. (App. A, 21a-30a). In doing so, however, it did not discuss the factors set forth in *Gore* and *Green Oil*, and in no way attempted to explain what Defendants were guilty of that subjected them to punitive damages in the first place.[6] This Petition for Writ of Certiorari follows.

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[6] Defendants were certainly grateful to a certain extent that the court reduced the punitive award from $600,000 to $150,000. However, it has been and remains Defendants' position that punitive damages were unwarranted in this case.

REASONS WHY THE WRIT SHOULD BE GRANTED

I. The Decision of The Supreme Court of Alabama, Holding That The "Certificate of Quality Assurance" Is a "Written Warranty" Within The Meaning of The Magnuson-Moss Warranty Act, Directly Conflicts With The Plain Meaning of The Statute And The Decisions of The United States Courts of Appeal.

The Magnuson-Moss Warranty Act is a remedial statute designed to protect consumers from deceptive warranty practices. Its draftsmen believed that consumer product warranties often were too complex to be understood, too varied to allow meaningful comparisons and too restricted to provide meaningful warranty protection. The Act's draftsmen sought to remedy these perceived ills by imposing extensive disclosure requirements and minimum content standards on particular types of written consumer product warranties. *Skelton v. General Motors Corp.*, 660 F.2d 311 (7th Cir. 1981), *cert. denied*, 456 U.S. 974 (1982). However, the Act does not *require* a manufacturer or seller to extend a warranty with its product. *Id.* (citing 15 U.S.C. § 2302(b)(2)).

Except in specific instances in which the Magnuson-Moss Warranty Act expressly prescribes a regulating rule, the Act calls for the application of state written and implied warranty law, not the creation of additional federal law. *Walsh v. Ford Motor Co.*, 807 F.2d 1000 (D.C. Cir. 1986), *cert. denied*, 482 U.S. 915 (1987).

At trial, during post-trial motions, and on appeal to the Alabama Supreme Court, Defendants argued that the trial court erred in allowing the count of breach of implied warranty to go to the jury. (App. H, 3h; App. A, 5a-9a). In its "Limited One-Year Warranty," Horton excluded all implied warranties. (App. D, 21d-22d). Under Alabama's version of the Uniform Commercial Code, a seller may exclude implied warranties by including in the contract a "conspicuous" written statement

disclaiming those warranties. *See*, ALA. CODE § 7-2-316(2) (1975). In its opinion in this case, the Alabama Supreme Court conceded that the language used in Horton's exclusion of limited warranties was "conspicuous." (App. A, 5a). However, the Plaintiff, in his complaint, incorporated 15 U.S.C. § 2308(a) into his claim for breach of implied warranty. (App. D, 2d-3d). Fifteen U.S.C. § 2308(a) states in pertinent part as follows:

> (a) Restrictions on disclaimers or modifications
>
> No supplier may disclaim or modify (except as provided in subsection (b) of this section) any implied warranty to a consumer with respect to such consumer product if (1) ***such supplier makes any written warranty to the consumer with respect to such consumer product***, or (2) at the time of sale, or within 90 days thereafter, such supplier enters into a service contract with the consumer which applies to such consumer product.

Id. (emphasis added).[7] (App. C, 5c-5d).

The term "written warranty," in turn, has a *specific* definition under the Magnuson-Moss Warranty Act. Under 15 U.S.C. § 2301(6), "written warranty" is defined as follows:

> (6) The term "written warranty" means –
>
> (A) any written affirmation of fact or written promise made in connection with the sale of a consumer product by a supplier to a buyer which ***relates to the nature of the material or workmanship and affirms or promises that such material or workmanship is defect free or will meet a specified level of performance over a specified period of time***, or

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[7] 15 U.S.C. § 2301(7) defines "implied warranty" as "an implied warranty arising under State law (as modified by sections 2308 and 2304(a) of this title) in connection with the sale by a supplier of a consumer product."15 U.S.C. § 2301(7)

. . . .

> which written affirmation, promise, or undertaking becomes part of the basis of the bargain between a supplier and a buyer for purposes other than resale of such product.

Id. (emphasis added) (App. C, 1c-2c).

When the home in question was initially delivered to the Plaintiff's lot, there was a "Certificate of Quality Assurance" located on the counter top. The certificate included the statement "Your new home has been carefully inspected to ensure quality and cleanliness" and included the phrase "Built for a lifetime!" (App. F, 1f).

In its opinion in this case, the Alabama Supreme Court held that the "Certificate of Quality Assurance" was a "written warranty" within the meaning of 15 U.S.C. § 2301(6).[8] Thus, the court held, Horton's disclaimer of implied warranties was ineffective under 15 U.S.C. § 2308(a). (App. A, 5a-9a).

The "Certificate of Quality Assurance," however, clearly does not rise to the level of a "written warranty" within the meaning of 15 U.S.C. § 2301(6). As emphasized above, a written statement is not a "written warranty" unless it ***"relates to the nature of the material or workmanship and affirms or promises that such material or workmanship is defect free or will meet a specified level of performance over a specified period of time."*** 15 U.S.C. § 2301(6). Nothing in the language of the certificate "relates to the nature of the material or workmanship" or "affirms or promises that such material or workmanship is defect free or will meet a specified level of performance over a specified period of time." *Id.* (App. A, 33a-35a) (See, J., *dissenting*).

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[8] Plaintiff never alleged at trial, and never argued on appeal, that the "Certificate of Quality Assurance" amounted to a written warranty under the Magnuson-Moss Warranty Act. The Supreme Court of Alabama made this finding on its own behalf.

In *Skelton v. General Motors Corp.*, 660 F.2d 311 (7th Cir. 1981), *cert. denied*, 456 U.S. 974 (1982), the court addressed the precise issue in dispute in the case at hand – whether and when written materials furnished with a product rise to the level of a "written warranty" under 15 U.S.C. § 2301(6). In *Skelton*, the plaintiffs sued GM under the Magnuson-Moss Warranty Act for breach of express and implied warranties based upon alleged warranties and representations made in GM's "brochures, manuals, consumer advertising and other forms of communications to the public generally" regarding transmissions contained in GM automobiles. *Id.* at 312. In its discussion, the court in *Skelton* noted that the district court had properly concluded that some of the alleged GM warranties did not fall within the definition of "written warranty" under 15 U.S.C. § 2301(6). There, the court stated as follows:

> Plaintiffs' complaint alleged that GM had warranted that its automobiles contained THM 350 (M38) transmissions, or "transmissions of similar quality and performance . . . and that (such transmissions) would meet a specified level of performance." The district court concluded that such a warranty did not fall within the § 101(6) definition of "written warranty," ***because it did not affirm that the transmission would "meet a specified level of performance over a specified period of time."*** 15 U.S.C. § 2301(6) (1976) (emphasis added). See 500 F. Supp. at 1185-86. This conclusion is consistent with the FTC's interpretation of § 101(6), which is set forth in its regulations at 16 C.F.R. § 700.3(a) (1980):
>
> The Act imposes specific duties and liabilities on suppliers who offer written warranties on consumer products. Certain representations, such as energy efficiency ratings for electrical appliances, care labeling of wearing apparel, and other product information disclosures may be express warranties under the Uniform Commercial Code. However, these disclosures alone

> are not written warranties under this Act. ***Section 101(6) provides that a written affirmation of fact or a written promise of a specified level of performance must relate to a specified period of time in order to be considered a "written warranty." A product information disclosure without a specified time period to which the disclosure relates is therefore not a written warranty.***

Skelton, 660 F.2d at 316 n.7 (emphasis added) (*quoting* 16 C.F.R. § 700.3(a) (1980)).

The *Skelton* court went on to state that "it is quite plausible that the Act's draftsmen defined "written warranty" in § [23]01(6) so as to exclude general descriptions of consumer products or their components from the reach of the Act, since it would be excessively cumbersome to impose the Act's disclosure rules on every advertisement containing a description of a product or its components." *Skelton*, 660 F.2d at 316.

After an exhaustive review of the legislative history of the Magnuson-Moss Warranty Act, and after thorough consideration of the relevant rules of statutory construction, the *Skelton* court finally held that the statutory definition of "written warranty" in 15 U.S.C. § 2301(6) did not apply to any undefined "document," or "pile of written documents" as argued by the plaintiffs. *Skelton*, 660 F.2d at 322; *see also, Simmons v. Taylor Childre Chevrolet-Pontiac, Inc.*, 629 F. Supp. 1030 (M.D. Ga. 1987) (citing *Skelton* and holding that car dealership's invoice which contained a designation that a vehicle was "new" was not a "written warranty" within the meaning of the Magnuson-Moss Warranty Act); *Motor Homes of America, Inc. v. O'Donnell*, 440 So. 2d 422 (Fla. Dist. Ct. App. 4 1983) (citing *Skelton* and holding that motor home dealership did not make a "written warranty" within the meaning of the Magnuson-Moss Warranty Act).

Further, the courts have held that the existence of a "written warranty" *is* a prerequisite to maintaining an

implied warranty claim under the Magnuson-Moss Warranty Act. *Robin Towing Corp. v. Honeywell, Inc.*, 859 F.2d 1218 (5th Cir. 1988) (holding that buyer of a faulty home security system could not maintain an action for breach of implied warranty against supplier under Magnuson-Moss Warranty Act where the supplier of the system expressly disclaimed all written and implied warranties); *see also, McNamara v. Nomeco Building Specialties, Inc.*, 26 F. Supp. 2d 1168 (D. Minn. 1998) (holding that buyer of window for home could not maintain an action for breach of implied warranty against window supplier under Magnuson-Moss Warranty Act where window supplier did not provide a written warranty with the product).

If the decision of the Alabama Supreme Court is allowed to stand, precedent on an important issue of federal law will be set contrary to controlling law on said issue and contrary to the interest of the framers of the Magnuson-Moss Warranty Act. One can only imagine the types of advertising materials, promotional literature, slogans, logos, and the like, which would be transformed into "written warranties" under this holding. Public policy certainly does not favor such a liberal construction of the term "written warranty."

Because the "Certificate of Quality Assurance" is not a "written warranty" within the meaning of the Act, Horton's disclaimer of implied warranties was effective under state law. Thus, the count of breach of implied warranty should never have been submitted to the jury.

II. The Decision of the Supreme Court of Alabama, Awarding the Plaintiff Attorney's Fees And Costs under the Magnuson-Moss Warranty Act, Conflicts with the Relevant Decisions of the United States Courts of Appeal and of this Court.

A. A Prevailing Plaintiff under the Magnuson-Moss Warranty Act May Not Recover Attorney's Fees and Costs Arising out of the Pursuit of Unrelated Claims.

It is undisputed that the Magnuson-Moss Warranty Act allows for a successful plaintiff to recover of attorney's fees and costs. 15 U.S.C. § 2310(d)(2). (App. C, 10c-11c). However, a prevailing plaintiff may not recover attorney's fees relating to the unsuccessful pursuit of unrelated claims. *Hensley v. Eckerhart*, 461 U.S. 424 (1983).[9] In *Hensley*, this Court examined the issue of whether a prevailing party may recover attorney's fees and costs related to the unsuccessful pursuit of unrelated claims. There, this Court stated:

> In some cases a plaintiff may present in one lawsuit distinctly different claims for relief that are based on different facts and legal theories. In such a suit, even where the claims are brought against the same defendants – often an institution and its officers, as in this case – counsel's work on one claim will be unrelated to his work

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[9] In *Hensley*, this Court addressed a prevailing party's right to recover attorney's fees and costs under the *Civil Rights Attorney's Fees Awards Act of 1976*, 42 U.S.C. § 1983. In *Hensley*, this Court stated that "[t]he standards set forth in this case are generally applicable in all cases in which Congress has authorized an award of fees to a 'prevailing party.' " 461 U.S. at 433 n.7. Thus, the standards set forth in *Hensley* and its progeny would apply to the award of attorney's fees and costs under the Magnuson-Moss Warranty Act. *See, e.g., Hines v. Chrysler Corp.*, 971 F.Supp. 212 (E.D. Pa. 1997) (citing *Hensley* and affirming reduction of attorney's fee request in Magnuson-Moss case).

> on another claim. Accordingly, work on an unsuccessful claim cannot be deemed to have been "expended in pursuit of the ultimate result achieved." . . . The congressional intent to limit awards to prevailing parties requires that these unrelated claims be treated as if they had been raised in separate lawsuits, and therefore ***no fee may be awarded for services on the unsuccessful claim.***

461 U.S. at 434-35 (emphasis added) (internal citation omitted).

The *Hensley* Court went on to hold that ***"[w]here the plaintiff has failed to prevail on a claim that is distinct in all respects from his successful claims, the hours spent on the unsuccessful claim should be excluded in considering the amount of a reasonable fee."*** 461 U.S. at 440 (emphasis added); *see also, Riverside v. Rivera*, 477 U.S. 561 (1986) (citing *Hensley* and stating, "where a prevailing party has succeeded on only some of his claims, an award of fees for time expended on unsuccessful claims may not be appropriate"); *Mills by Mills v. Freeman*, 118 F.3d 727, 733 (11th Cir. 1997) (citing *Hensley* and affirming reduction in fee request where plaintiff failed to prevail on all claims); *Popham v. City of Kennesaw*, 820 F.2d 1570 (11th Cir. 1987) (citing *Hensley* and affirming reduction in fee award where plaintiff prevailed on only some of his claims); *Muscare v. Quinn*, 614 F.2d 577 (7th Cir. 1980) (holding that plaintiff was not entitled to attorney's fee on unsuccessful claim); *Hibbs v. Jeep Corp.*, 666 S.W.2d 792 (Mo. 1984), *cert. denied*, 469 U.S. 853 (1984) (***affirming the denial of attorney's fees under the Magnuson-Moss Warranty Act where the documents submitted by the plaintiff's attorney in support of his claim for attorney's fees demonstrated that much of the time spent was on claims against earlier dismissed defendants, and did not show with any clarity what portion of the time charged was***

spent on the claims specifically related to the Magnuson-Moss Warranty Act) (emphasis added).

In the case at hand, the Plaintiff failed to prevail on many claims which were distinct in all respects from the successful claims. Again, the Plaintiff prevailed in only four of the fifteen counts he asserted.[10] The Plaintiff prevailed on the following counts: Count I – Breach of Express Warranty, Count II – Breach of Implied Warranty, Count III – Violation of the Magnuson-Moss Warranty Act, and Count VII – Wanton Repair. Counts I, II, and III were the only counts which gave rise to the award of attorney's fees and costs. Count VII – Wanton Repair, was a state law claim which did not carry with it the potential award of attorney's fees and costs.

Each of the unsuccessful counts were based upon factual allegations and legal theories which were different than those raised in the Magnuson-Moss counts. For instance, the fraudulent concealment and misrepresentation counts alleged that the Horton defendants concealed, suppressed or misrepresented certain facts about the condition of the manufactured home. Under Alabama law, the count of fraudulent concealment requires proof of (1) a duty to disclose facts, (2) concealment or nondisclosure of material facts by the defendant, (3) inducement of the

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[10] The Plaintiff failed to prevail on the following counts: Count IV – Negligent Construction, Count V – Wanton Construction, Count VI – Negligent Repair, Count VIII – Fraudulent Concealment, Count IX – Misrepresentation, Count X – Negligent Transportation, Delivery and Setup (as to Defendant Morgan), Count XI – Wanton Transportation, Delivery and Setup (as to Defendant Morgan), Count XII – Failure to Disclose (as to Defendant Morgan), Count XIII – Misleading Warranty Under Magnuson-Moss Warranty Act, Count XIV – Breach of Warranty (second count), and Count XV – Violation of Magnuson-Moss Warranty Act (second count). Each of these counts were either dismissed by the trial court or withdrawn by the Plaintiff at various stages during the trial.

plaintiff to act, and (4) action by the plaintiff to his injury. Jim Roberts & Barry Cusimano, *Alabama Tort Law* § 20.16 (3rd Ed. 2000). Misrepresentation requires proof of (1) a false representation, (2) concerning a material existing fact, (3) upon which the plaintiff reasonably relies, (4) which proximately causes injury or damage to the plaintiff. *Id.* at § 20.3. It is evident that these allegations interjected legal elements and factual concerns that went well beyond the simple questions of whether Horton issued a warranty, and if so, whether Horton breached that warranty, which would be decided by simple contract law.

Furthermore, the Plaintiff failed to prevail on the counts of negligent construction and negligent repair. In Alabama, as elsewhere, negligence requires proof of (1) the existence of a duty on behalf of the defendant, (2) the defendant's breach of that duty, (3) the existence of a causal relationship between the defendant's conduct and the plaintiff's injuries, and (4) resulting injury to the plaintiff. Roberts & Cusimano, *supra*, § 1.0. Thus, the negligence counts also interjected legal elements and factual concerns which would not have arisen in a simple breach of warranty case.

Finally, the Plaintiff failed to prevail on his counts against Defendant George Morgan. In his claims against Defendant Morgan, the Plaintiff essentially alleged that the home was improperly installed. (App. D, 12d-16d). Defendant George Morgan was a party defendant in this action until the close of all evidence, when the Plaintiff voluntarily dismissed all claims against him without prejudice. It is indisputable that the counts against Defendant Morgan were factually and legally distinct from the Magnuson-Moss counts against Horton.

Even though the Plaintiff failed to prevail on the unrelated claims against Horton, and also failed to prevail on the unrelated claims against Defendant Morgan, the Plaintiff sought, and was awarded, attorneys' fees and costs related to the litigation as a whole. Based upon

the dictates of *Hensley* and its progeny this was clearly an abuse of discretion.

The Plaintiff, however, was successful in his pursuit of the unrelated state law claim of wanton repair. In *Hensley*, the Court did not directly address the issue of whether a prevailing party may recover attorney's fees and costs relating to the *successful* pursuit of *unrelated* state law claims. However, the Court did state that hours spent on successful claims that are excessive, redundant, or otherwise unnecessary should be eliminated from a fee petition. 461 U.S. at 436. Clearly, the attorney's fees and costs related to the Plaintiff's successful pursuit of the unrelated wanton repair claim were excessive and unnecessary, especially in light of the fact that the wanton repair claim did not itself give rise to the award of attorney's fees.

> In Alabama, "wantonness" is defined as follows:
>
> The conscious doing of some act or omission of some duty under knowledge of existing conditions and conscious that from the doing of such act or omission of such duty an injury will likely or probably result. Before a party can be said to be guilty of wanton conduct it must be shown that with reckless indifference to the consequences he either consciously and intentionally did some wrongful act or consciously omitted some known duty which produced the injury.

Alabama Pattern Jury Instructions, Civil, No. 29.00.

Thus, it is clear that the issue of whether Defendants were guilty of wantonness was factually and legally distinct from the issue of whether Horton issued a warranty with the home, and, if so, whether Horton breached that warranty.

It is undeniable that the Plaintiff's attorney expended much time and effort in this case developing facts necessary to prove wantonness and arguing for punitive damages. This is evidenced by the fact that the Plaintiff has been successful, to date, in prevailing on the wanton

repair count and in recovering punitive damages. The time and effort expended on the wanton repair count and in pursuit of punitive damages would have been unnecessary had this case been a simple breach of warranty case.[11] Thus, under *Hensley* and its progeny, attorney's fees and costs related to the wanton repair claim should have been excluded from the fee award.

B. The Supreme Court of Alabama Improperly Placed the Burden of Proof on Defendants, Where it Held That Horton Bore the Burden of Raising Specific Objections to Plaintiff's Fee Request, and by Failing to Raise Such Specific Objections, the Trial Court Was Thereby Authorized to Treat the Plaintiff's Fee Request as Uncontroverted.

In *Hensley*, this Court stated that "the fee applicant bears the burden of establishing entitlement to an award and documenting the appropriate hours expended and hourly rates. The applicant should exercise "billing judgment" with respect to hours worked, . . . , ***and should maintain billing time records in a manner that will enable a reviewing court to identify distinct claims.***" 461 U.S. at 437 (emphasis added); *see also, Riverside v. Rivera*, 477 U.S. 561 n.4 (1986) (quoting the *Hensley* language above); *Villano v. City of Boynton Beach*, 254 F.3d 1302, 1311 (11th Cir. 2001) (affirming reduction in lodestar amount where prevailing party's fee request "did not provide sufficient detail" and where it "[did] not clearly identify the subject matter of each time expenditure"); *Mills By Mills v. Freeman*, 118 F.3d 727, 733 (11th Cir. 1997) ("[t]he party seeking the fees has the burden of submitting evidence in support of the hour and rates claimed and is

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[11] In Alabama, the cause of action for breach of express or implied warranty does not give rise to the award of punitive damages.

entitled to recover those fees for hours that were 'reasonably expended' "); *Norman v. Housing Authority of City of Montgomery*, 836 F.2d 1292, 1303 (11th Cir. 1988) ("fee counsel should have maintained records to show the time spent on the different claims, and the general subject matter of the time expenditures ought to be set out with sufficient particularity so that the district court can assess the time claimed for each activity"); *Erkins v. Bryan*, 785 F.2d 1538 (11th Cir. 1986), *cert. denied*, 479 U.S. 960 (1986) (affirming reduction in fee request where one-third of hours claimed were unnecessary, duplicative or ***poorly documented***); *Hughes v. Repko*, 578 F.2d 483, 486-87 (3rd Cir. 1978) ("[t]he burden of persuasion must rest on the petitioner to demonstrate to the court the number of hours attributable to the successful claim"); *Hibbs v. Jeep Corp.*, 666 S.W. 2d 792, *cert. denied*, 469 U.S. 853 (1984) (affirming the denial of attorney's fees under the Magnuson-Moss Warranty Act where the documents did not show with any clarity what portion of the time charged was spent on the claims related to the Magnuson-Moss Warranty Act).

In the case at hand, the Plaintiff's attorney did not even attempt to document what portion of the time he submitted was spent on claims specifically related to the Magnuson-Moss Warranty Act. Instead, the Plaintiff's attorney's billing ledger, which was submitted as an exhibit to his motion for attorney's fees and costs, gave only a very generalized accounting of his billing activities and did not designate time spent on specific claims. (App. G, 1g-5g). The Plaintiff's billing ledger included *all* time expended on the case, which consisted of *all* time spent on *all* claims, both successful and unsuccessful, against *all* defendants. At hearing on Plaintiff's fee request, counsel for Defendants specifically objected to Plaintiff's request on the grounds that the Plaintiff's attorney should not be entitled to recover attorney's fees and costs related to the unsuccessful pursuit of unrelated claims, and that the Plaintiff's attorney should not be

entitled to recover attorney's fees and costs related to the successful pursuit of unrelated claims which themselves did not carry the potential award of attorney's fees and costs. (App. I, 1i-3i).

The Alabama Supreme Court, in its decision in this matter, improperly held that Horton Homes bore the burden of objecting to specific items or charges for work that it considered improper, and by failing to raise such specific objections, the trial court was thereby authorized to treat the Plaintiff's fee request as uncontroverted. (App. A, 19a-20a). By placing the burden upon the defendant to raise specific objections to the prevailing party's fee request, the holding of the Alabama Supreme Court directly conflicts with this Court's holding in *Hensley*, and its progeny. Under the rule of law that this Court pronounced in *Hensley*, the Plaintiff's attorney bore the burden of maintaining billing records in a manner that would enable a reviewing court to identify distinct claims. The Plaintiff's attorney clearly failed to carry his burden. Because the Plaintiff's attorney failed to carry his burden, the trial court abused its discretion in granting the fee request.

C. The Trial Court Abused its Discretion in Awarding Attorney's Fees and Costs under the Magnuson-Moss Warranty Act, Where the Trial Court Made No Findings Whatsoever Regarding the Plaintiff's Entitlement to Attorney's Fees and Costs.

In *Hensley*, this Court stated as follows:

> It remains important, however, ***for the district court to provide a concise but clear explanation of its reasons for the fee award.*** When an adjustment is requested on the basis of either the exceptional or limited nature of the relief obtained by the plaintiff, ***the district court should make clear that it has considered the***

> ***relationship between the amount of the fee awarded and the results obtained.***

461 U.S. at 437; *see also, Villano v. City of Boynton Beach*, 254 F.3d 1302,1308 (11th Cir. 2001) (holding that case was due to be remanded to district court on issue of attorney's fees where district court failed to conduct thorough legal analysis); *Mills by Mills v. Freeman*, 118 F.3d 727, 734 (11th Cir. 1997) (district court's order on fee request must allow for meaningful review); *Norman v. Housing Authority of City of Montgomery*, 836 F.2d 1292, 1303 (11th Cir. 1988) ("[a] conclusory statement that a fee is reasonable in light of the success obtained is generally insufficient. . . . The court's order on attorney's fees must allow meaningful review – the district court must articulate the decisions it made, give principled reasons for those decisions, and show its calculation."); *Adams v. Mathis*, 752 F.2d 553 (11th Cir. 1985) (remanding case to district court for an award of a proper fee based on the proper standard and to articulate its rulings in sufficient detail to enable reviewing court to accomplish a meaningful review); *Hill v. Seaboard Coast Line R. Co.*, 767 F.2d 771, 775 (11th Cir. 1985) (remanding case to district court for adequate explanation as to why it reduced fee award); *Fitzpatrick v. Internal Revenue Service*, 665 F.2d 327, 332 (11th Cir. 1982) (remanding case to district court on basis of inadequate explanation of reduction of fee request and stating, "[a]n adequate explanation of the fee award is absolutely essential to appellate review; without it, review is impossible because no basis exists to judge the trial court's exercise of its discretion"); *Bartholomew v. Watson*, 665 F.2d 910 (9th Cir. 1982) (remand necessary for district court to make specific findings as to amount of time spent by counsel on prevailing claims).

In *Orchano v. Advanced Recovery, Inc.*, 107 F.3d 94 (2nd Cir. 1997), the court vacated and remanded the district court's decision reducing the prevailing party's fee request, based upon the district court's inadequate explanation for the reduction. There, the court stated:

> [I]n the absense of such a statement [explaining the fee award], it will be difficult, if not impossible, for the reviewing court to determine whether the award was within the proper exercise of the district court's discretion,. . . . A recitation of the applicable factors or legal standard, standing alone, is normally not sufficient to permit appropriate appellate review. The court must inform the reviewing court as to how the standard has been applied to the facts as the court has found them. ***If the court fails to make findings and to give an explanation, and the reason for the court's ruling is not clear to us, we will remand for findings and an explanation.***

Id., p. 99 (internal citation omitted) (emphasis added), citing *Cohen v. West Haven Bd. of Police Com'rs*, 638 F.2d 496 (2nd Cir. 1980).

In the case at hand, the trial court made no effort to explain its award of attorney's fees and costs. The trial court simply entered an order granting Plaintiff's fee request. (App. J, 1j-2j). The trial court's order was entirely inadequate. Specifically, the trial court made no findings as to the twelve factors enunciated in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), as suggested by *Hensley*. *See, Hensley*, 461 U.S. at 429-30. Further, the trial court made no findings as to whether the Plaintiff's attorney's requested hourly rate was reasonable. Further still, the trial court made no findings as to whether the unsuccessful claims raised by the Plaintiff, or the successful wanton repair claim, were related to the Magnuson-Moss claims. In short, the trial court made no findings whatsoever, and a meaningful review of the trial court's order is, thus, impossible.

Because the trial court failed to make findings and to give an explanation for its ruling awarding attorney's fees and costs, the trial court abused its discretion in granting the fee request.

III. The Award of Punitive Damages in this Case Violates the Due Process Clause of the Fourteenth Amendment, Where Neither the Trial Court Nor the Supreme Court of Alabama Engaged in Any Sort of Meaningful Review of the Award.

The Due Process Clause of the Fourteenth Amendment prohibits a State from imposing a 'grossly excessive' punishment on a tortfeasor. *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996); *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415 (1994); *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993). A decision to punish a tortfeasor by means of an exaction of exemplary damages is an exercise of state power that must comply with the Due Process Clause of the Fourteenth Amendment. *Oberg*, 512 U.S. at 434-35. When absent procedures would have provided protection against arbitrary and inaccurate adjudication, this Court has not hesitated to find the proceedings violative of due process. *Id.*, p. 430 (citing *Tumey v. Ohio*, 273 U.S. 510 (1927); *Brown v. Mississippi*, 297 U.S. 278 (1936); *In re Oliver*, 333 U.S. 257 (1948); *In re Winship*, 397 U.S. 358, 361 (1970).

Over the course of the past decade or so, this Court has had the opportunity on several occasions to pass upon the constitutionality of punitive damage awards rendered in Alabama cases. In *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991), this Court upheld an award of punitive damages in an Alabama case as not violative of the Due Process Clause of the Fourteenth Amendment. However, in affirming the award, this Court placed great emphasis on the procedures in place in Alabama to protect against excessive punitive damage awards. Specifically, this Court stated as follows:

> 2. Before the trial in this case took place, the Supreme Court of Alabama had established post-trial procedures for scrutinizing punitive awards. In *Hammond v. City of Gadsden*, 493 So. 2d 1374 (1986), it stated that ***trial courts are***

"to reflect in the record the reasons for interfering with a jury verdict, or refusing to do so, on grounds of excessiveness of the damages." *Id.*, at 1379. Among the factors deemed "appropriate for the trial court's consideration" are the "culpability of the defendant's conduct," the "desirability of discouraging others from similar conduct," the "impact upon the parties," and "other factors, such as the impact on innocent third parties." *Ibid.* The *Hammond* test ensures meaningful and adequate review by the trial court whenever a jury has fixed the punitive damages.

3. ***By its review of punitive awards, the Alabama Supreme Court provides an additional check on the jury's or trial court's discretion. It first undertakes a comparative analysis. See, e.g., Aetna Life Ins. Co. v. Lavoie, 505 So. 2d 1050, 1053 (1987). It then applies the detailed substantive standards it has developed for evaluating punitive awards. [FN10] In particular, it makes its review to ensure that the award does "not exceed an amount that will accomplish society's goals of punishment and deterrence."*** *Green Oil Co. v. Hornsby*, 539 So. 2d 218, 222 (1989); *Wilson v. Dukona Corp.*, 547 So. 2d 70, 73 (1989). This appellate review makes certain that the punitive damages are reasonable in their amount and rational in light of their purpose to punish what has occurred and to deter its repetition.

. . . .

The application of these standards, we conclude, imposes a sufficiently definite and meaningful constraint on the discretion of Alabama factfinders in awarding punitive damages. ***The Alabama Supreme Court's postverdict review ensures that punitive damages awards are not grossly out of proportion to the severity of the***

offense and have some understandable relationship to compensatory damages.

. . . .

Pacific Mutual thus had the benefit of the full panoply of Alabama's procedural protections. The jury was adequately instructed. The trial court conducted a post-verdict hearing that conformed with Hammond. The trial court specifically found that the conduct in question "evidenced intentional malicious, gross, or oppressive fraud," App. to Pet. for Cert. A14, and found the amount of the award to be reasonable in light of the importance of discouraging insurers from similar conduct, id., at A15. ***Pacific Mutual also received the benefit of appropriate review by the Supreme Court of Alabama. It applied the Hammond standards and approved the verdict thereunder. It brought to bear all relevant factors recited in Hornsby.***[12]

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[12] The *Green Oil* factors are as follows: (1) Punitive damages should bear a reasonable relationship to the harm that is likely to occur from the defendant's conduct as well as to the harm that actually has occurred. If the actual or likely harm is slight, the damages should be relatively small. If grievous, the damages should be much greater. (2) The degree of reprehensibility of the defendant's conduct should be considered. The duration of this conduct, the degree of the defendant's awareness of any hazard which his conduct has caused or is likely to cause, and any concealment or 'cover-up' of that hazard, and the existence and frequency of similar past conduct should all be relevant in determining this degree of reprehensibility. (3) If the wrongful conduct was profitable to the defendant, the punitive damages should remove the profit and should be in excess of the profit, so that the defendant recognizes a loss. (4) The financial position of the defendant would be relevant. (5) All the costs of litigation should be included, so as to encourage plaintiffs to bring wrongdoers to trial. (6) If criminal sanctions have been imposed on the defendant for his conduct, this should be taken into account in

Haslip, 499 U.S. at 20-22 (emphasis added).

In *Honda Motor Co., Ltd. v. Oberg*, a case arising out of Oregon, this Court confronted the issue of whether post-verdict judicial review of punitive awards is *required* under the Due Process Clause of the Fourteenth Amendment. 512 U.S. 415. In holding that Oregon's denial of judicial review of punitive damage awards violated the Due Process Clause, this Court stated:

> The opinions in both *Haslip* and *TXO* strongly emphasized the importance of the procedural component of the Due Process Clause. In *Haslip*, the Court held that the common-law method of assessing punitive damages did not violate procedural due process. In so holding, ***the Court stressed the availability of both "meaningful and adequate review by the trial court" and subsequent appellate review.*** . . . Similarly, in *TXO*, the plurality opinion found that the fact that the "award was reviewed and upheld by the trial judge" and unanimously affirmed on appeal gave rise "to a strong presumption of validity." . . . Concurring in the judgment, Justice SCALIA (joined by Justice THOMAS) considered it sufficient that traditional common-law procedures were followed. In particular, he noted that ***" 'procedural due process' requires judicial review of punitive damages awards for reasonableness."***

Oberg, 512 U.S. at 420-21 (emphasis added) (internal citations omitted).

In *BMW of North America, Inc. v. Gore*, this Court again addressed an Alabama jury's award of punitive damages. In *Gore*, however, unlike *Haslip*, this Court held that the punitive damage award affirmed by the Alabama

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mitigation of the punitive damages award. (7) If there have been other civil actions against the same defendant, based on the same conduct, this should be taken into account in mitigation of the punitive damages award. *Green Oil* at 223, 224.

Supreme Court transcended the constitutional limits under the Due Process Clause of the Fourteenth Amendment. *Gore*, 517 U.S. at 585-86. In its discussion in *Gore*, this Court again implicitly approved of the factors set forth in *Green Oil*, and previously approved of by this Court in *Haslip*. *Id.*, p. 566. In addition to the *Green Oil* factors, this Court in *Gore* prescribed three additional factors to be considered by the courts in reviewing punitive damage awards. Those factors are: (1) the degree of reprehensibility of the defendant's conduct; (2) the disparity between the harm or potential harm suffered and the size of the punitive award; and (3) the difference between this remedy and the civil penalties authorized or imposed in comparable cases. *Id.*, p. 575. In applying these three factors to the facts in *Gore*, this Court determined that the punitive damage award was excessive.

Recently, this Court has again addressed the punitive damage issue. In *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001), this Court adopted a *de novo* standard of review in passing on punitive damage awards. In *Leatherman*, the Court discussed its rationale for adopting the higher standard of review stating in pertinent part as follows:

> [T]he precise meaning of concepts like "reasonable suspicion" and "probable cause" cannot be articulated with precision; they are "fluid concepts that take their substantive content from the particular contexts in which the standards are being assessed." . . . That is, of course, also a characteristic of the concept of "gross excessiveness." Second, "the legal rules for probable cause and reasonable suspicion acquire content only through application. ***Independent review is therefore necessary if appellate courts are to maintain control of, and to clarify, the legal principles." . . . Again, this is also true of the general criteria set forth in Gore; they will acquire more meaningful content through case-by-case application at the appellate level.***

> "Finally, *de novo* review tends to unify precedent" and " 'stabilize the law.' " . . . Justice BREYER made a similar point in his concurring opinion in Gore:
>
> "Requiring the application of law, rather than a decisionmaker's caprice, does more than simply provide citizens notice of what actions may subject them to punishment; it also helps to assure the uniform treatment of similarly situated persons that is the essence of law itself." . . .

Id., p. 436.

In the case at hand, Horton Homes, unlike the Pacific Mutual in *Haslip*, has not received the "full panoply" of Alabama's procedural protections; far from it. Although *Hammond* and *Green Oil*, and their respective progeny, are still the state of the law in Alabama, the trial court did not reflect in the record its reasons for refusing to cut the punitive damage award, and made no findings whatsoever regarding the *Gore* and *Green Oil* factors. (App. J, 1j-2j). Furthermore, under *Hammond*, it was, and presumably still is, the policy of the Alabama Supreme Court, whenever a trial court did not reflect in the record its rationale for cutting or refusing to cut a punitive award, to remand such a case to the trial court for findings consistent with *Hammond*, *Green Oil* and *Gore*. For some unknown reason, however, the Alabama Supreme Court in this case did not remand to the trial court pursuant to *Hammond*, even though these petitioners urged it to do so.

Nor did the Alabama Supreme Court conduct any type of *meaningful* review of the punitive award. The court expended much of its energy in its opinion adopting the *de novo* standard of review and expounding upon its reasons for doing so. (App. A, 21a-30a). The court, however, spent no time explaining why Horton Homes should be punished. The court ***never*** brought to bear any of the factors set forth in *Gore* or *Green Oil*. Instead, the court, in its final two paragraphs, simply stated:

> Consistent with the direction of the United States Supreme Court that the amount of a punitive-damages award be reviewed *de novo* when constitutional issues have been raised, this Court has reviewed actions in which punitive damages were awarded for fraud, for trespass, or for conversion; some of the awards this Court has affirmed [FN11] and some of them it has affirmed on the condition that the plaintiff agree to a remittitur of a portion of the punitive-damages award. [FN12]
>
> Following our *de novo* review, we direct that the plaintiff reduce the punitive-damages award to $150,000 (a remittitur of $450,000). . . .

(App. A, 29a-30a). Apparently, the court simply substituted its judgment for the judgment of the trial court.

Furthermore, even though the Alabama Supreme Court adopted the *de novo* standard of review, it did nothing to clarify the legal principles it attempted to apply. If anything, it made them more confusing. The court's holding brings to mind a series of disturbing questions: How can an appellate court conduct a *de novo* review of the trial court's findings when the trial court has made no findings to review? How can the criteria set forth in *Gore* acquire more meaningful content through case-by-case application at the appellate level, if the appellate level does not even apply the *Gore* factors in reaching its decision? How can an appellate court affirm a punitive damage award to any degree when neither it nor the trial court have made any findings whatsoever as to the criteria set forth in *Gore*? Perhaps most importantly – What procedures remain "due" at the trial and appellate court levels as to the review of punitive damage awards in the wake of this Court's decision in *Leatherman*?

Apparently, the Alabama Supreme Court has interpreted *Leatherman* to read that the appellate court should substitute its judgment for the judgment of the trial court

without any reference to the factors set forth in *Gore* and *Green Oil*. The result of this interpretation, however, is that the ultimate decision is simply a matter of replacing the 'decisionmaker's caprice' at the trial level with the 'decisionmaker's caprice' at the appellate level.

The bottom line in this case is that Horton has asserted from the beginning that punitive damages were unwarranted in this case. Yet all of the procedures that are designed to protect against excessive and unwarranted punitive awards have failed them – the procedures have been ignored by the trial court and the Supreme Court of Alabama. To date, there has been no finding by any court as to what Horton did, or failed to do, to warrant the imposition of punitive damages. There has been no "application of law" whatsoever. In short, these Defendants have been denied due process.

Based upon the foregoing, it is clear that the award of punitive damages in this case violates the Due Process Clause of the Fourteenth Amendment.

Respectfully submitted,

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APPENDIX A

NOTICE: This opinion is subject to formal revision before publication in the advance sheets of ***Southern Reporter***. Readers are requested to notify the **Reporter of Decisions**, Alabama Appellate Courts, 300 Dexter Avenue, Montgomery, Alabama 36104-3741 ((334) 242-4621), of any typographical or other errors, in order that corrections may be made before the opinion is printed in ***Southern Reporter***.

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2001-2002

1000346

Horton Homes, Inc., and Southern Manufactured Homes, Inc.

v.

Scott Brooks

Appeal from Elmore Circuit Court
(CV-98-238)

On Applications for Rehearing

(Filed Nov. 30, 2001)

HOUSTON, Justice.

The opinion of July 13, 2001, is withdrawn and the following is substituted therefor.

In July 1998, Scott Brooks sued Southern Manufactured Homes, Inc., and Horton Homes, Inc. (hereinafter

together referred to as "Horton Homes"), seeking damages based on claims that arose out of his purchase of a manufactured home. The case proceeded to trial, and the jury awarded Brooks compensatory damages of $150,000 and punitive damages of $600,000.

Horton Homes appeals from the judgment entered on the jury's verdict, raising several issues: (1) whether the trial court erred in allowing the breach-of-implied-warranty claim to go to the jury; (2) whether the court erred in allowing the wanton-repair claim and the related punitive-damages issue to go to the jury; (3) whether the court erred in allowing Brooks's attorney to question the Horton Homes representative about other lawsuits and consumer complaints that had been filed against Horton Homes; (4) whether the $150,000 award of compensatory damages was excessive; (5) whether the court erred in assessing, against Horton Homes, attorney fees in the amount of $34,612.50 and costs in the amount of $5,340.03; and (6) whether the $600,000 award of punitive damages was excessive.

In August 1997, Brooks specially ordered a manufactured home from Factory Direct Homes, Inc. ("Factory Direct Homes"), a dealer in Montgomery. Horton Homes manufactured the home for Brooks. In September 1997, the home was delivered. Brooks executed a purchase contract and financed the purchase of the home. The purchase price was $63,414.90.

In October 1997, Brooks and his family moved into the home. They immediately began experiencing problems – for example, water from the washer would back up into the kitchen sink when it was discharged from the washer; water dripped under the house; floors were not

level; and the shower stalls cracked. Additional problems soon developed – when the kitchen cabinets began to warp and come apart, Brooks investigated and found that the dishwasher was leaking because a hole had been drilled through it; the floor buckled near the washer; plasterboard and floor covering in the utility room turned different colors; water leaked in the wall between the kitchen and the utility room; and the furnace was leaning.

Brooks reported the problems to Factory Direct Homes, which corrected some of the problems (replacing the shower stalls and the dishwasher) and attempted to correct the other problems. In the spring of 1998, Factory Direct Homes went out of business, and in early May 1998 Brooks contacted Horton Homes directly regarding the problems he was continuing to have with the home. On two occasions (May 30, 1998, and June 20, 1998), Horton Homes sent service crews to the Brooks home to correct the problems. However, the service crews were unsuccessful in completing the necessary repairs, and, in fact, according to Brooks's testimony, the home was in worse condition after the service crew left on June 20, 1998, than when they arrived.

Brooks testified that when he arose on the morning after the repairs, i.e., on Sunday, June 21, 1998, which was Father's Day, furnishings were still where the service crew had moved them – the kitchen table was still in the den, the refrigerator was still in the dining room, and the freezer was still outside. He said that the dishwasher no longer worked because it had been damaged when a cabinet fell on it; that the stove had a gas leak; that canned goods were stacked on the kitchen counters; that the new floor covering was wrinkled and had big gouges around the perimeter; that the new flooring was soft and

that a hole had been accidentally drilled in the new flooring and had been filled with wood putty; that the trim had not been replaced; and that debris was stacked by the side of the house. Brooks testified that he telephoned Horton Homes on several occasions, but that no one returned to complete the repairs that were begun on June 20, 1998, until after he had sued.

On July 14, 1998, Brooks filed a multi-count complaint against Horton Homes.[1] After a trial, the jury awarded damages to Brooks, and the trial court entered a judgment on the verdict. The case was submitted to the jury on the breach-of-express-warranty, breach-of-implied-warranty, and wanton-repair claims.[2] The verdict form the jury returned stated:

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[1] Brooks's original complaint against Horton Homes contained nine counts – counts alleging breach of express warranty, breach of implied warranty, violation of the Magnuson-Moss Warranty Act, negligent construction, wanton construction, negligent repair, wanton repair, fraudulent concealment, and misrepresentation. Brooks later amended the complaint to add George Morgan as a defendant and to state three counts against him – negligent transportation, delivery, and set-up; wanton transportation, delivery, and set-up; and failure to disclose. Brooks amended the complaint a second time to add three counts against Horton Homes – counts alleging "misleading warranty under Magnuson-Moss Warranty Act," breach of warranty, and violation of the Magnuson-Moss Warranty Act.

[2] The remaining counts against Horton Homes were either withdrawn by Brooks or were disposed of by a judgment as a matter of law. At the conclusion of the trial, Brooks dismissed all claims against George Morgan, and those claims were not submitted to the jury.

> "We the jury find the issues in favor of the plaintiff Scott Brooks and against the defendants Southern Manufactured Homes, Inc., and Horton Homes, Inc., and assess the plaintiff's damages at $150,000 compensatory and $600,000 punitive."

The court denied Horton Homes' motion for a judgment as a matter of law. This appeal followed.

First, Horton Homes contends that the trial court erred when it allowed the breach-of-implied-warranty claim to go to the jury. Generally, implied warranties apply only to the seller, not the manufacturer. *See Ex parte General Motors Corp.*, 769 So.2d 903, 910 (Ala. 1999). However, implied warranties can apply to the manufacturer when, as in this case, the product has been specially manufactured for a particular customer and the manufacturer can reasonably expect the customer to be affected by any problems with the product. *See Liberty Homes, Inc. v. Epperson*, 581 So.2d 449, 453 (Ala. 1991). The evidence indicates that Brooks specially ordered the manufactured home and that his name appeared on the paperwork that accompanied the home as it moved along the manufacturing line.

In its "Limited One-Year Warranty" contained in the "Home Owner's Manual," Horton Homes, by conspicuous language, purported to exclude all implied warranties.[3] Horton Homes argues that this fact distinguishes

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[3] The "LIMITED ONE-YEAR WARRANTY," found on page 69 of the "Home Owner's Manual," stated, in part:

> "This warranty gives you specific legal rights and you may also have other legal rights which vary from

the present case from *Epperson* because, it says, in *Epperson* the manufacturer did not exclude any implied warranties. However, while the *Epperson* opinion, 581 So.2d at 453, notes that the "Home Owner's Manual" included a limitation of warranty, it does not indicate the wording of that limitation of warranty. Therefore, *Epperson* does not indicate whether the manufacturer excluded implied warranties. Additionally, no issue regarding the effect of an exclusion of implied warranties on Epperson's claim alleging breach of implied warranties was raised or addressed in this Court's opinion in *Epperson*.[4]

The issue we now must address is whether Horton Homes' purported exclusion of implied warranties in the

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> state to state. Horton Homes, Inc. makes the foregoing warranty expressly IN LIEU OF ANY OTHER EXPRESS OR IMPLIED WARRANTY, INCLUDING ANY IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS, WHICH IMPLIED WARRANTIES ARE HEREBY EXPRESSLY EXCLUDED, and expressly in lieu of any other obligation on the part of the manufacturer."

[4] In *Southern Energy Homes, Inc. v. Washington*, 774 So. 2d 505, 511 n.1 (Ala. 2000), Washington contended that Southern, the manufacturer, was liable under implied warranties because he had specially ordered the mobile home that Southern Energy Homes had manufactured. In *Washington*, 774 So. 2d at 509, the one-year warranty conspicuously purported to exclude implied warranties. This Court affirmed the trial court's judgment entered on the jury's verdict awarding damages to Washington. One of the claims submitted to the jury alleged breach of implied warranties. However, no issue regarding the effect of the purported exclusion of implied warranties on Washington's claim alleging breach of implied warranties was raised or addressed in this Court's opinion in *Washington*.

"Limited One-Year Warranty" contained in the "Home Owner's Manual" precludes Brooks's breach-of-implied warranty claim. In the portion of his complaint alleging a breach of implied warranty, Brooks referred to 15 U.S.C. § 2308(a), a portion of the Magnuson Moss Warranty Act:[5]

> "§ 2308. Implied warranties
>
> "(a) Restrictions on disclaimers or modifications
>
> "*No supplier may disclaim* or modify (except as provided in subsection (b) of this section) *any implied warranty to a consumer with respect to such consumer product if (1) such supplier makes any written warranty to the consumer with respect to such consumer product*, or (2) at the time of sale, or within 90 days thereafter, such supplier enters into a service contract with the consumer which applies to such consumer product."

(Emphasis added.) The term "written warranty" is defined in 15 U.S.C. § 2301(6):

> "(6) The term 'written warranty' means –
>
> "(A) any written affirmation of fact or written promise made in connection with the sale of a consumer product by a supplier to a buyer which relates to the nature of the material or workmanship and affirms or promises that such material or workmanship is defect free or will meet a specified level of performance over a specified period of time. . . .

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[5] The Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301 through 2312, applies to mobile homes. *Liberty Homes, Inc. v. Epperson*, 581 So. 2d 449, 453 (Ala. 1991).

"....

> "which written affirmation, promise, or undertaking becomes part of the basis of the bargain between a supplier and a buyer for purposes other than resale of such product."

In this case, Brooks specially ordered a double-wide manufactured home. When Horton Homes manufactured this home for Brooks, in September 1997, its policy was for the production-line manager and the final-finish supervisor on the line where the home was manufactured to sign a "Certificate of Quality Assurance"; that certificate included the statement "Your new home has been carefully inspected to ensure quality and cleanliness" and included the phrase "Built for a Lifetime!" This certificate was also signed by the cleaning-crew supervisor and by crew members.

Horton Homes manufactured Brooks's home on September 2, 1997. On that date, two "Certificates of Quality Assurance" were signed for the Brooks home (one for each section of the double-wide), and they were placed on the kitchen counter of the home. The first time Brooks saw the home was approximately September 8, 1997, when the home was delivered to his lot. Brooks testified that when he entered the kitchen, he saw the certificates and read them and that he relied on the certificates when he executed the paperwork to purchase the home. Brooks testified that if he had known that the production-line manager had signed the certificates in blank, he would have made further inspection before purchasing the home. Thus, we conclude that these "Certificates of Quality Assurance" are "written warranties" within the meaning of the Magnuson-Moss Warranty Act and that Horton

Homes' purported disclaimer of implied warranties is ineffective.[6] Therefore, the trial court properly submitted the breach-of-implied-warranty claim to the jury.

Second, Horton Homes contends the trial court erred when it submitted to the jury the wanton-repair claim. The basis for this contention is Horton Homes' argument that Brooks is not entitled to recover damages for mental anguish under a wanton-repair claim because the only "injury" was to the product itself and Brooks failed to show that he suffered "a physical injury as a result of [Horton Homes'] negligent conduct, or [that he was] placed in immediate risk of physical harm by that conduct." *Ex parte Grand Manor, Inc.*, 778 So. 2d 173, 179 (Ala. 2000).

However, even if Horton Homes' argument concerning mental-anguish damages under the wanton-repair claim is correct (a point on which we express no opinion), it would not follow that it was error to submit the wanton-repair claim to the jury. Given the general verdict form, there is no basis to believe that any mental-anguish damages were awarded under the wanton-repair claim as opposed to the breach-of-warranty claims.[7]

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[6] In *Auburn Ford, Lincoln Mercury, Inc. v. Norred*, 541 So. 2d 1077 (Ala. 1989), Lisa Norred purchased a used automobile and an "Extended Service Contract" from Auburn Ford. This Court, relying on 15 U.S.C. § 2308(a), stated that while Auburn Ford's "as is" disclaimer would normally be sufficient to preclude Norred's breach-of-warranty claim, her purchase of the service contract rendered Auburn Ford's disclaimer ineffective to exclude any implied warranties. 541 So. 2d at 1080.

[7] A homeowner or homebuyer may recover compensatory damages for mental anguish resulting from a breach of contract

Third, Horton Homes contends the trial court erred when it permitted Brooks to question Jimmy Dean Holton, Horton Homes' representative, about other lawsuits and consumer complaints filed against Horton Homes. At trial, the following exchange occurred between Holton and Brooks's attorney:

> "[BROOKS'S ATTORNEY]: . . . [Horton Homes] state[s] that if this home is shown to contain a defect or malfunction, [Brooks] did not allow [Horton Homes] a reasonable number of attempts to remedy said defects.
>
> "Is that Horton's position in this litigation?
>
> "[HOLTON]: Response is probably indicated because we were not allowed to continue to try to solve his problem, and he refused service on July 17, I think.
>
> ". . . .
>
> "[BROOKS'S ATTORNEY]: Sir, my question is simply, is it Horton's position in this case that, quote, if the home is shown to contain a defect or malfunction, [Brooks] did not allow [Horton Homes] a reasonable number of attempts to remedy said defects?
>
> "[HOLTON]: Yes.
>
> ". . . .

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or warranty in the sale or repair of the home, regardless of the zone of danger. *Southern Energy Homes, Inc. v. Washington*, 774 So. 2d 505, 518-19 (Ala. 2000); *Sexton v. St. Clair Fed. Sav. Bank*, 653 So. 2d 959, 960-62 (Ala. 1995); *Liberty Homes, Inc. v. Epperson*, 581 So. 2d 449, 453-54 (Ala. 1991); *Lawler Mobile Homes, Inc. v. Tarver*, 492 So. 2d 297, 306 (Ala. 1986).

"[BROOKS'S ATTORNEY]: How long does Horton contend that Mr. Brooks should have continued to wait for Horton to solve his problems?

"[HOLTON]: Well, from the time we got involved in it, we only had something like May 5 to – we had vacation. I mean, under 50 days, I think it was.

"[BROOKS'S ATTORNEY]: How much longer beyond July 14, 1998, do you contend Mr. Brooks should have continued to wait?

"[HOLTON]: I don't have an answer for that."

Thereafter, the parties and the trial court held an extensive discussion on the record, but outside the presence of the jury, on Horton Homes' motion in limine, seeking to exclude evidence of other lawsuits or complaints filed against Horton Homes. The trial court ruled that there was probative value to allowing Brooks to question the Horton Homes' corporate representative about the number of other lawsuits and complaints similar to Brooks's and concluded that that ruling was supported by *Southern Energy Homes, Inc. v. Washington*, 774 So. 2d 505, 515-16 (Ala.2000).[8] Horton Homes excepted to this ruling.

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[8] In *Washington*, 774 So. 2d at 515-16, this Court stated:

"McNutt testified on direct examination that Southern would have responded if Washington and his wife had actually made any of the telephone calls that they alleged. McNutt reaffirmed this assertion on cross-examination and testified further that Southern did not let any consumer complaints go unanswered. In response, Washington questioned the

Although Horton Homes excepted to the trial court's ruling denying its motion in limine, it did not object

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> representative about documents, filed with the Alabama Manufactured Housing Commission, that contained allegations from 113 other homeowners that Southern had not responded to their complaints. . . . The trial court expressly limited Washington's use of the documents to impeachment purposes and prohibited Washington from using the documents for proving the truth of the matters asserted therein. In light of the fact that McNutt attempted to bolster his testimony by asserting that Southern never lets any customer complaint go unanswered, the trial court did not abuse its discretion in determining that the prejudicial impact of the impeachment questioning did not substantially outweigh the probative value of those questions."

(Citations omitted.) In the present case, Horton Homes' position was that Brooks did not wait long enough before suing for it to have an opportunity to repair the defects. It was Brooks's position, while arguing against the motion in limine, that he should be allowed to question the Horton Homes' representative about other lawsuits and complaints that alleged that Horton Homes had failed to make repairs. The trial court agreed.

Additionally, we note that in its instructions to the jury the trial court stated:

> "In regards to the other lawsuits filed against [Horton Homes], ladies and gentlemen, the Court instructs you as follows: The complaint in a lawsuit is no more than a means of commencing an action. And the mere filing thereof does not import – let me start it again.
>
> "The complaint in a lawsuit is no more than a means of commencing an action. And the mere filing thereof does not import verity even in the proceeding in which it was filed.

when Brooks questioned Holton regarding other lawsuits and complaints. The following exchange occurred while Brooks questioned Holton:

> "[BROOKS'S ATTORNEY]: How many times has Horton been sued for failure to repair defects in homes that customers request?
>
> "[HORTON HOMES' ATTORNEY]: Your Honor, we have a stipulation that there have been 185 lawsuits in which Horton was named and I talk collectively, Southern/Horton, were named in which there was an allegation of a repair that was not complete or not properly done.
>
> "THE COURT: Ladies and gentlemen, I told you earlier and I'll tell you again now that a stipulation stands as a proven fact that requires no further proof. So counsel for [Horton Homes] has stipulated that 185 lawsuits have been filed against this company for failure to effect repairs or to do warranty work. Is that right?
>
> "[HORTON HOMES' ATTORNEY]: That was the allegations, that's right.
>
> ". . . .
>
> "[HORTON HOMES' ATTORNEY]: Excuse me, Your Honor. Our stipulation, what we were asked to do is determine within the last five

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"Some of the evidence in this case, ladies and gentlemen, namely testimony that other lawsuits have been filed against [Horton Homes], has been received in evidence for a limited purpose. And you should consider this evidence along with all the other evidence in the case material to the issues but only for the purpose for which it was received."

years. And that is the number that represents the last five years.

"[BROOKS'S ATTORNEY]: That was the next question that I was going to ask him.

"[HORTON HOMES' ATTORNEY]: Our stipulation is that with regard to these named companies collectively, 185 lawsuits alleging warranty issues within the last five years, which was the time frame the Court gave us.

"THE COURT: Correct.

". . . .

"[BROOKS'S ATTORNEY]: Now, in each state is there an administrative agency that enforces the regulations of the Department of Housing and Urban Development concerning manufactured homes?

"[HOLTON]: Yes.

"[BROOKS'S ATTORNEY]: Do those agencies typically receive complaints from consumers about problems they have with manufactured homes?

"[HOLTON]: Yes.

"[BROOKS'S ATTORNEY]: And within the last five years, how many complaints have been filed against Horton Homes and Southern Manufactured Housing just in the state of Alabama?

"[HORTON HOMES' ATTORNEY]: Your Honor, I don't believe we addressed that. We provided those to [Brooks's attorney]. Do you have a number? Do you know how many there are we gave you?

"[BROOKS'S ATTORNEY]: I have a list of what was provided.

"THE COURT: Let's just test the witness's knowledge, which is what we're supposed to be doing here.

"[BROOKS'S ATTORNEY]: Do you know how many have been filed just in the State of Alabama within the last five years where there is an allegation of failure to make repairs?

"[HOLTON]: No, sir.

"THE COURT: Now, is there a stipulation?

"[HORTON HOMES' ATTORNEY]: If [Brooks's attorney] knows what the number is that we gave him, I'll take his number. The number we come up with is 53. Once again, what the Court asked us to do was produce the last five years of those, and there are 53 of those.

"THE COURT: So stipulated.

"[HORTON HOMES' ATTORNEY]: Once again, where there was an issue raised about repair."

Additionally, Brooks asked Holton if Horton Homes had, within the five-year period before September 1997, received any complaints that alleged the repair crews had actually done additional damage when attempting to make repairs. Holton answered, "Not to my knowledge." Then Brooks displayed, by an overhead projector, two complaints that contained such allegations, and Horton Homes did not object. In *Odom v. Schofield*, 480 So. 2d 1217, 1218 (Ala. 1985), this Court stated:

"We have held previously that a movant who receives an adverse ruling on a motion to

> exclude evidence, made *in limine*, preserves the adverse ruling for post-judgment and appellate review *only* if he objects to the introduction of the evidence when it is offered at trial, *and* if he assigns specific grounds for the objection."

Thus, Horton Homes failed to preserve this issue for review.

Fourth, Horton Homes contends that the award of $150,000 in compensatory damages was excessive. Unrefuted evidence indicated that if Horton Homes made approximately $12,000 in repairs then the problems with Brooks's manufactured home (those that were caused by, or were the responsibility of, Horton Homes) would be cured.[9] Horton Homes contends that the $150,000 award must have included an award of $138,000 for mental anguish, and that such an award was excessive.

However, in *Washington*, 774 So. 2d at 518-19, this Court affirmed an award of $375,000 in compensatory damages based on the plaintiff Washington's purchase of a custom-built mobile home for $19,320. This Court stated, "Evidence indicating that Washington experienced such feelings [as he had testified to] over such an extended period supports the jury's finding of mental anguish under the standard established in [*Kmart Corp. v. Kyles*, 723 So. 2d 572, 578-79 (Ala. 1998)]." 774 So. 2d at

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[9] Brooks retained Randall Chesser to inspect his mobile home for defects. Chesser prepared a "cost-to-cure (repair) analysis," wherein he found that the manufacturer should be responsible for $12,295 in repairs and that the dealer should be responsible for $4,900 in repairs. Chesser testified at trial, and his "cost-to-cure (repair) analysis" was introduced into evidence.

519. In *Kmart Corp. v. Kyles*, 723 So. 2d at 578, this Court stated:

> "Under Alabama law, the presence of physical injury or physical symptoms is not a prerequisite for a claim for damages for mental anguish. 'The plaintiff is only required to present some evidence of mental anguish, and once the plaintiff has done so, the question of damages for mental anguish is for the jury.' The amount of the jury's award is left to the jury's sound discretion, and the jury's award will not be set aside absent a clear abuse of discretion. Also, a jury's verdict is presumed correct, and that presumption is strengthened by the trial court's denial of a motion for new trial. But, here we must address the strength of the presumption in light of the plaintiff's failure to testify about the nature of her alleged mental anguish.
>
> ". . . .
>
> "We now clearly allow the testimony of a witness as to his or her mental anguish. The question thus remains, in the present era, when we permit a witness to offer evidence as to the witness's own mental anguish, is indirect evidence of mental anguish alone sufficient to support a substantial verdict? We answer this question in the negative. We give stricter scrutiny to an award of [mental-anguish damages] where the victim has offered little or no direct evidence concerning the degree of suffering he or she has experienced."

(Citations omitted.)

Mental anguish includes anxiety, embarrassment, anger, fear, frustration, disappointment, worry, annoyance, and inconvenience. *Volkswagen of America, Inc. v. Dillard*, 579 So. 2d 1301, 1307 (Ala. 1991); *B & M Homes, Inc. v. Hogan*, 376 So. 2d 667, 673 (Ala. 1979). At trial, Brooks testified to the following:

> "Q. Scott, what effect has this had on you personally?
>
> "A. It's been very stressful.
>
> "Q. In what way?
>
> "A. Well, just a fear that I'm going to be stuck with this situation that – You know, when I first started talking to the dealer, they were saying, 'Don't worry Mr. Brooks, we're going to take care of it.' And I went eight months with them. And the same things that they did, the factory came in and started doing. It was just a repeat. They didn't even see anything wrong with the way they were putting my floor down. I can't live with it like that. I mean, this was a brand new house. I bought a brand new house. I paid a substantial amount of money for this house.
>
> "Q. How much did the house cost?
>
> "A. It was $63,000.
>
> "Q. Go ahead.
>
> "A. And I was – I felt like I was getting jerked around by these people. All I asked them to do was fix my house. I didn't ask for four of them to take ten months to fix my house. It didn't matter to me if the people did it or the factory did it. All I wanted was my house to be

repaired so I could go on with my life. It was very stressful. . . .

"Q. Have you lost any sleep about this?

"A. Yes, sir, I have.

"Q. Have you cried?

"A. Yes, sir, I have.

"Q. Do you feel like that they dealt with you honestly in what –

"A. No, sir, I do not."

At trial, Brooks's wife testified that Brooks "was a nervous wreck" and "stayed stressed out" and "[got] edgy about stuff." She stated that he would get up at 2:00, 3:00, or 4:00 in the morning and just sit on the couch and that when she would get up and ask him what was wrong he would tell her that "he didn't know what [they] were going to do" because "[they had worked] very hard for what little bit [they did] have and he just didn't know . . . if [they were] going to have to end up fixing it [themselves] or what." Brooks's wife also testified that when they would have guests over to their home, Brooks "would just get real upset and you could see tears in his eyes and sometimes running down his face" when they would begin talking about the problems with the home. Thus, we conclude that Brooks presented sufficient evidence to justify the jury's award of approximately $138,000 in mental-anguish damages. *Washington, supra.*

Fifth, Horton Homes contends the trial court erred in awarding $34,612.50 in attorney fees and $5,340.03 in costs. Brooks's attorney moved for an award of attorney

fees and costs and filed a supporting affidavit. The Magnuson-Moss Act, 15 U.S.C. § 2310(d)(2), provides for the recovery of attorney fees for violation of written warranties:

> "If a consumer finally prevails in any action brought under paragraph (1) of this subsection, he may be allowed by the court to recover as part of the judgment a sum equal to the aggregate amount of cost and expenses (including attorneys' fees based on the actual time expended) determined by the court to have been reasonably incurred by the plaintiff for or in connection with the commencement and prosecution of such action, unless the court in its discretion shall determine that such an award of attorneys' fees would be inappropriate."

Horton Homes filed nothing in opposition to this motion and affidavit and, at the hearing on the motion, Horton Homes did not specifically identify any work or expense claimed by the attorney that was unnecessary. Horton Homes bore the burden of objecting to specific items or charges for amounts for work that it considered improper, and when it declined to identify any work or expense that it considered unnecessary the trial court could properly treat those amounts as uncontroverted. *See Lewis, Wilson, Lewis, & Jones, Ltd. v. First Nat'l Bank of Tuscumbia*, 435 So. 2d 20, 23 (Ala. 1983); *Costa & Head Dev. Co. v. Mayer Elec. Supply Co.*, 562 So. 2d 1323, 1325 (Ala. Civ. App. 1989). Thus, we find no abuse of discretion on the part of the trial court in awarding attorney fees in the amount of $34,612.50 and costs in the amount of $5,340.03.

Finally, Horton Homes contends that the $600,000 award of punitive damages was excessive. Horton Homes has properly challenged the constitutionality of the punitive-damages award as being a denial of the due process guaranteed by the Fourteenth Amendment to the Constitution of the United States and Art. I, § 13, of the Constitution of Alabama of 1901; and as violating the "excessive-fines" provision of the Eighth Amendment of the Constitution of the United States and Art. I, § 15, of the Constitution of Alabama.

In *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 121 S. Ct. 1678, 1684-89 (2001), the United States Supreme Court wrote:

> "Despite the broad discretion that States possess with respect to the imposition of criminal penalties and *punitive* damages, the Due Process Clause of the Fourteenth Amendment to the Federal Constitution imposes substantive limits on that discretion. That Clause makes the Eighth Amendment's prohibition against excessive fines and cruel and unusual punishments applicable to the States. *Furman v. Georgia*, 408 U.S. 238 (1972) (*per curiam*). The Due Process Clause of its own force also prohibits the States from imposing 'grossly excessive' punishments on tortfeasors. [*BMW of North America, Inc. v.] Gore*, 517 U.S. [559,] at 562 [(1996)]; *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 453-455 (1993) (plurality opinion).
>
> "The Court has enforced those limits in cases involving deprivations of life . . . and deprivations or property. . . .
>
> "In these cases [cases cited in the preceding paragraph for the proposition stated there (but

omitted from this quotation)], the constitutional violations were predicated on judicial determinations that the punishments were 'grossly disproportional to the gravity of . . . [the] defendant[s'] offense[s].' . . . We have recognized that the relevant constitutional line is 'inherently imprecise' . . . rather than one 'marked by a simple mathematical formula.' But in deciding whether the line has been crossed, we have focused on the same general criteria: the degree of the defendant's reprehensibility or culpability; the relationship between the penalty and the harm to the victim caused by the defendant's actions; and the sanctions imposed in other cases for comparable misconduct. Moreover, and of greatest relevance for the issue we address today, in each of these cases we have engaged in an independent examination of the relevant criteria.

" . . . ' . . . [T]he question whether a fine is constitutionally excessive calls for the application of a constitutional standard to the facts of a particular case, and in this context *de novo* review of that question is appropriate.'

" . . . [I]n *Ornelas [v. United States*, 517 U.S. 690 (1996)], we held that trial judges' determinations of reasonable suspicion and probable cause should be reviewed *de novo* on appeal. The reasons we gave in support of that holding are equally applicable in this case. First, as we observed in *Ornelas*, the precise meaning of concepts like 'reasonable suspicion' and 'probable cause' cannot be articulated with precision; they are 'fluid concepts that take their substantive content from the particular contexts in which the standards are being assessed.' *Id.*, at 696.

That is, of course, also a characteristic of the concept of 'gross excessiveness.' Second, 'the legal rules for probable cause and reasonable suspicion acquire content only through application. Independent review is therefore necessary if appellate courts are to maintain control of, and to clarify, the legal principles.' *Id.*, at 697. Again, this is also true of the general criteria set forth in *Gore; they will acquire more meaningful content through case-by-case application at the appellate level. 'Finally,* de novo *review tends to unify precedent' and 'stabilize the law.' Id.,* at 697-698. JUSTICE BREYER made a similar point in his concurring opinion in *Gore*:

> " '*Requiring the application of law,* rather than a decisionmaker's caprice, *does more than simply provide citizens notice of what actions may subject them to punishment; it also helps to assure the uniform treatment of similarly situated persons that is the essence of law itself.*' 517 U.S., at 587.

"Our decisions in analogous cases, together with the reasoning that produced those decisions, thus convince us that *courts of appeals should apply a* de novo *standard of review when passing on district courts' determinations of the constitutionality of punitive damages awards.*

"III

" '*Unlike the measure of actual damages suffered, which presents a question of historical or predictive fact, the level of punitive damages is not really a "fact" "tried" by the jury.' Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 459 (1996)

(SCALIA, J., dissenting). *Because the jury's award of punitive damages does not constitute a finding of 'fact,' appellate review of the District Court's determination that an award is consistent with due process does not implicate . . . Seventh Amendment concerns. . . .*

"....

"Differences in the institutional competence of trial judges and appellate judges are consistent with our conclusion. In *Gore*, we instructed courts evaluating a punitive damages award's consistency with due process to consider three criteria: (1) the degree or reprehensibility of the defendant's misconduct, (2) the disparity between the harm (or potential harm) suffered by the plaintiff and the *punitive* damages award, and (3) the difference between the *punitive* damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. 517 U.S., at 574-575. Only with respect to the first *Gore* inquiry do the district courts have a somewhat superior vantage over courts of appeals, and even then the advantage exists primarily with respect to issues turning on witness credibility and demeanor. Trial courts and appellate courts seem equally capable of analyzing the second factor. And the third *Gore* criterion, which calls for a broad legal comparison, seems more suited to the expertise of appellate courts. Considerations of institutional competence therefore fail to tip the balance in favor of deferential appellate review.

"IV

". . . .

> "We have made these comments on issues raised by application of the three *Gore* guidelines to the facts of this case, not to prejudge the answer to the constitutional question, but rather to illustrate why we are persuaded that the Court of Appeals' answer to that question may depend upon the standard of review. The *de novo* standard should govern its decision. Because the Court of Appeals applied a less demanding standard in this case, we vacate the judgment and remand the case for further proceedings consistent with this opinion."

(Emphasis added.) (Some citations omitted.)

Previously, in reviewing claims that punitive-damages awards were excessive, we have given deference to the jury's award. "In remitting a punitive damages award, we must remit *only that amount in excess of the maximum amount that a properly functioning jury could have awarded.*" *Big B, Inc. v. Cottingham,* 634 So. 2d 999, 1006 (Ala. 1993) (emphasis added).

The Alabama Legislature in Act No. 87-185, Ala. Acts 1987, enacted what became Ala.Code 1975, § 6-11-23(a) ("No presumption of correctness shall apply as to the amount of punitive damages awarded by the trier of the fact.") and § 6-11-24(a) ("On appeal, no presumption of correctness shall apply to the amount of punitive damages awarded."). This Court declared these sections unconstitutional in *Armstrong v. Roger's Outdoor Sports, Inc.*, 581 So. 2d 414 (Ala. 1991), with Maddox, J., dissenting, at 423-27; Houston, J., dissenting, at 427-35; and

Steagall, J., dissenting, at 435-36. Today, 10 years later, relying on the United States Supreme Court's decision in *Cooper Industries*, this Court will begin applying the standard of review directed by the Legislature in 1987.

In applying the de novo standard of review to Horton Homes' constitutional challenge to the amount of the punitive-damages award, we must review the evidence and the law without deference to the jury's award or to the trial court's rulings. *Black's Law Dictionary*, pp. 94 ("appeal de novo") and 447 ("de novo") (7th ed. 1999). In reviewing the punitive-damages award de novo, we note that the plaintiff had approximately $12,000 in actual economic loss; that he was awarded $150,000 in compensatory damages; and that we have affirmed that award. The plaintiff's attorney was awarded attorney fees of $34,612.50 and costs in the amount of $5,340.03, to be paid by the defendants, and we have affirmed those awards. Therefore, there is no need to have punitive damages as an augmentation of compensatory damages to cover the reasonable costs of litigation or in any way to compensate the plaintiff. The compensatory-damages award made the plaintiff whole.

Ala. Code 1975, § 6-11-21, as amended by Act No. 99-358, Ala. Acts 1999, became effective more than a year before this action was tried (June 27-30, 2000). Section 6-11-21(a), with exceptions not applicable in this case, provides that "in all civil actions where an entitlement to punitive damages shall have been established under applicable laws, no award of punitive damages shall exceed three times the compensatory damages of the

party claiming punitive damages or five hundred thousand dollars ($500,000), whichever is greater." The "effective date" of Act No. 99-358 was June 7, 1999, but § 4 of that Act, which was not codified, provided: "This act shall apply to all actions commenced more than 60 days after the effective date of this act."[10]

Horton Homes filed what it styled as "Renewed Motion for Judgment as a Matter of Law; or, in the alternative, Motion for a New Trial; or in the alternative, Motion to Alter, Amend, or Vacate the Judgment; or in the alternative, Motion for Remittitur." In that motion it made the following argument:

> "All claims for punitive damages are subject to the provisions of § 6-11-21, et seq., Ala. Code 1975, including but not limited to the statutory cap on punitive damages. *See Goodyear Tire & Rubber Co. v. Vinson*, [749 So. 2d 393] (Ala. 1999) (Hooper, C.J., concurring specially). The Alabama Supreme Court's action abolishing the legislatively created cap on punitive damages was unconstitutional and is without effect. Under the Constitution of the United States and the State of Alabama, the Alabama Supreme Court

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[10] In *Swift v. Gregory*, 786 So. 2d 1097, 1100 (Ala. 2000), this Court held: "Once the Code Commission modifies an act and the Legislature thereafter adopts a Code containing the modification, the modification has the effect of law." However, this Court finds that after the modification of Act No. 99-358 by the Code Commissioner, the Legislature did not adopt a Code containing the modification until May 1, 2001, well after the date the judgment was entered in this action. *See* Act No. 2001-344, Ala. Acts 2001; *see also Densmore v. Jefferson County*, [Ms. 1000264, September 21, 2001] ___ So. 2d ___ (Ala. 2001).

> cannot abolish the cap created by the Legislature on punitive damages through judicial fiat. *See Honda Motor Co. v. Oberg*, [512 U.S. 415] (1994)."

This action is distinguishable from *Goodyear Tire & Rubber Co. v. Vinson*, 749 So. 2d 393 (Ala. 1999), because Horton Homes cited *Vinson* in its motion for a remittitur, arguing in that motion that this Court's ruling abolishing the cap on punitive damages was unconstitutional and that Brooks's claim for punitive damages was subject to the statutory cap on punitive damages. The trial court denied the motion for a remittitur; it did not reduce the punitive-damages award to $250,000. The trial court's decision not to apply the cap was an adverse ruling.

However, Horton Homes does not on appeal argue the issue raised by its motion – whether this Court's holding "abolishing the legislatively created cap on punitive damages was unconstitutional." This Court will not consider an issue not argued, except in exceptional circumstances, and we find no exceptional circumstances in this case. *See Armstrong v. Roger's Outdoor Sports, Inc.*, *supra*, in which there were three dissents, including one by the author of this present opinion. Therefore, the question whether *Henderson v. Alabama Power Co.*, 627 So. 2d 878 (Ala. 1993), insofar as it held unconstitutional the $250,000 cap on punitive damages violated the separation-of-powers doctrine of the Alabama Constitution is not before us. *See Goodyear Tire & Rubber Co. v. Vinson*, *supra*; *Ex parte Apicella*, [Ms. 1992273, March 30, 2001] ___ So. 2d ___ (Ala. 2001), and the authority cited therein. In *Cooper Industries*, 532 U.S. at ___, 121 S. Ct. at 1683-84, the United States Supreme Court held:

> "[L]egislatures enjoy broad discretion in authorizing and limiting permissible *punitive* damages awards. *Cf. Gore*, 517 U.S., at 568 ('States necessarily have considerable flexibility in determining the level of *punitive* damages that they will allow in different classes of cases in any particular case'). A good many States have enacted statutes that place limits on the permissible size of *punitive* damages awards. When juries make particular awards within those limits, the role of the trial judge is 'to determine whether the jury's verdict is within the confines set by state law, and to determine, by reference to federal standards developed under Rule 59 [, Fed. R. Civ. P.,] [in Alabama state courts by reference to the standards enunciated in *Gore* and in *Green Oil Co. v. Hornsby*, 539 So. 2d 218 (Ala. 1989)], whether a new trial or remittitur should be ordered.' *Browning-Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 279 (1989). If no constitutional issue is raised, the role of the appellate court, at least in the federal system [and in the state courts in Alabama], is merely to review the trial court's 'determination under an abuse-of-discretion standard.' "

Consistent with the direction of the United States Supreme Court that the amount of a punitive-damages award be reviewed de novo when constitutional issues have been raised, this Court has reviewed actions in which punitive damages were awarded for fraud, for trespass, or for conversion; some of the awards this Court has affirmed[11] and some of them it has affirmed on the

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[11] *New Plan Realty Trust & New Plan Realty Trust of Alabama, Inc., d/b/a The Club Apartments v. Morgan*, 792 So. 2d 351 (Ala.

condition that the plaintiff agree to a remittitur of a portion of the punitive-damages award.[12]

Following our de novo review, we direct that the plaintiff reduce the punitive-damages award to $150,000 (a remittitur of $450,000). If within 30 days Brooks files with this Court an acceptance of the remittitur, then the punitive-damages award, as reduced, will be affirmed. If he does not, then the judgment will be reversed and the case remanded for a new trial.

APPLICATIONS OVERRULED; OPINION OF JULY 13, 2001, WITHDRAWN; OPINION SUBSTITUTED; AFFIRMED CONDITIONALLY.

Lyons, Johnstone, Harwood, and Stuart, JJ., concur. Brown and Woodall, JJ., concur in the result. Moore, C.J., concurs in part and dissents in part. See, J., dissents.

MOORE, Chief Justice (concurring in part and dissenting in part).

2000); *Sheffield v. Andrews*, 679 So. 2d 1052 (Ala. 1996); *King Motor Co. v. Wilson*, 612 So. 2d 1153 (Ala. 1993); *O.K. Bonding Co. v. Milton*, 579 So. 2d 602 (Ala. 1991); *German Auto, Inc. v. Tamburello*, 565 So. 2d 238 (Ala. 1990); *Griggs v. Finley*, 565 So. 2d 154 (Ala. 1990); *Green Oil Co. v. Hornsby*, 539 So. 2d 218 (Ala. 1989); *Fruehauf Corp. v. Welch*, 519 So. 2d 502 (Ala. 1988); *Bernie Hughes Lincoln Mercury v. Merritt*, 523 So. 2d 441 (Ala. 1988); *Larry Savage Chevrolet, Inc. v. Richards*, 470 So. 2d 1168 (Ala. 1985); *Fountain-Lowrey Enters., Inc. v. Williams*, 424 So. 2d 581 (Ala. 1982); *Montgomery Lincoln-Mercury, Inc. v. Gaioni*, 402 So. 2d 928 (Ala. 1981); *Gunite Contracting Co. v. Mize*, 341 So. 2d 694 (Ala. 1977).

[12] *Chrysler Corp. v. Schiffer*, 736 So. 2d 538 (Ala. 1999); *BMW of North America, Inc. v. Gore*, 701 So. 2d 507 (Ala. 1997); *Fore[illegible]st Ins. Co. v. Parham*, 693 So. 2d 409 (Ala. 1997).

I would affirm the judgment, without a remittitur. I respectfully dissent from the order requiring a remittitur of the punitive-damages award, because I would defer to the jury and the trial judge, who were present during the fact-finding process of the trial. I question this Court's reliance on *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001), to change this Court's standard of review of punitive-damages awards. In that case, the United States Supreme Court required that federal appellate courts perform a de novo review of punitive-damages awards alleged to be excessive, to determine whether they are so large as to violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution, but that decision would not require this Court to change its standard. Also, because the Alabama Legislature has enacted tort-reform legislation, I question the appropriateness of this Court's providing a de novo review of punitive-damages awards in cases filed after the effective date of Act No. 99-358, Ala. Acts 1999, amending Ala. Code 1975, § 6-11-21.

I also disagree with the Court's explanation as to why Horton Homes' argument that the wanton-repair claim should not have not been submitted to the jury is incorrect.

According to Horton Homes, the wanton-repair claim should not have been submitted to the jury because, it argues, Brooks failed to prove that, as a result of Horton Homes' negligent conduct, he suffered a physical injury or was placed in immediate physical danger; thus, Horton Homes argues, Brooks is not entitled to mental-anguish damages under the wanton-repair claim. If Horton Homes is correct that the wanton-repair claim should

not have been submitted to the jury, then an award of any damages, whether compensatory or punitive, under the wanton-repair claim would be error. The majority opinion concludes that even if Horton Homes' argument is correct (and it expresses no opinion on that point), the submission of the wanton-repair claim to the jury was not error. It concludes that because the jury returned a general verdict "there is no basis to believe that any mental-anguish damages were awarded under the wanton claims as opposed to the breach-of-warranty claim." ___ So. 2d at ___.

However, Horton Homes did not object to the trial judge's jury instruction on this issue; therefore, it did not preserve this issue for appellate review. "Unchallenged jury instructions become the law of the case. *Louisville & Nashville R.R. v. Atkins*, 435 So. 2d 1275 (Ala. 1983). The jury is bound to follow such instructions, even if they are erroneous." *Clark v. Black*, 630 So. 2d 1012, 1017 (Ala. 1993)

Horton Homes never properly objected to the jury charge on damages for mental anguish. It attempts to argue on rehearing that it submitted an alternative jury charge on that issue, which the trial judge did not give, and that by submitting the alternative charge it adequately preserved the issue for appellate review. However, an objection must be brought to the attention of the trial judge with specificity at the time the alleged error is made. See Rule 51, Ala. R. Civ. P.; *Harper v. GFA Transp. Co.*, 432 So. 2d 1234 (Ala. 1983). As a result, Horton

Homes cannot now object to the submission of that claim to the jury.

As to all other issues, I concur.

SEE, Justice (dissenting).

I do not believe the two "Certificates of Quality Assurance" were "written warranties" within the meaning of 15 U.S.C. § 2301(6)(A); therefore, I believe Horton Homes' disclaimer was sufficient to preclude Brooks's breach-of-implied-warranty claim. See 15 U.S.C. § 2308(a) (providing, in relevant part, that "[n]o supplier may disclaim . . . any implied warranty to a consumer with respect to such consumer product if (1) such supplier makes any written warranty to the consumer with respect to such consumer product").

A "written warranty" is defined by the Magnuson-Moss Act as:

> "(A) any written affirmation of fact or written promise made in connection with the sale of a consumer product by a supplier to a buyer which relates to the nature of the material or workmanship and affirms or promises that such material or workmanship is defect free or will meet a specified level of performance over a specified period of time. . . .
>
> ". . . .
>
> "which written affirmation, promise, or undertaking becomes part of the basis of the bargain between a supplier and a buyer for purposes other than resale of such product."

15 U.S.C. § 2301(6)(A).

The two Certificates of Quality Assurance state that "Your new home has been carefully inspected to ensure quality and cleanliness," and that it was "Built for a Lifetime!" The majority presumes that these statements were written warranties under the Act. ___ So. 2d at ___. Neither statement, however, speaks to the "nature of the material or workmanship" or "promises that such material or workmanship is defect free or [that it] will meet a specified level of performance over a specified period of time," as is required by 15 U.S.C. § 2301(6)(A) for it to constitute a "written warranty." See *Simmons v. Taylor Childre Chevrolet-Pontiac, Inc.*, 629 F. Supp. 1030, 1032 (M.D. Ga. 1986) (holding that the description of an automobile as "new" on the dealer's invoice was not a "written warranty" under the Act because, among other things, it did not promise a specified level of performance relating to a specified period of time); see also *Marine Midland Bank v. Carroll*, 98 A.D.2d 516, 519, 417 N.Y.S.2d 409, 411 (1984) (holding that the "Dealer's Pre-Delivery Inspection Requirements" form was a "written warranty" under § 2301(6)(A) because it did "represent [ ] that the motor home had been inspected and tested and was found to 'perform, function, operate and/or serve exactly as intended' "); *Freeman v. HUBCO Leasing Inc.*, 253 Ga. 698, 702, 324 S.E.2d 462, 467 (1985) (holding that the warranty, which stated, among other things, that it covered "defects in materials or workmanship caused in the manufacture or assembly of any part of the vehicle" constituted a "written warranty" under § 2301).

Because the Certificates of Quality Assurance do not constitute "written warranties," as that term is defined in

the Magnuson-Moss Warranty Act, Horton Homes' disclaimer was sufficient to preclude Brooks's breach-of-implied-warranty claim. Therefore, I would hold that the trial court erred in submitting Brooks's breach-of-implied-warranty claim to the jury.

I, therefore, respectfully dissent.

APPENDIX B

NOTICE: This opinion is subject to formal revision before publication in the advance sheets of *Southern Reporter*. Readers are requested to notify the Reporter of Decisions, Alabama Appellate Courts, 300 Dexter Avenue, Montgomery, Alabama 36104-3741 ((334) 242-4621), of any typographical or other errors, in order that corrections may be made before the opinion is printed in *Southern Reporter*.

SUPREME COURT OF ALABAMA

SPECIAL TERM, 2001

1000346

Horton Homes, Inc., and
Southern Manufactured Homes, Inc.

v.

Scott Brooks

Appeal from Elmore Circuit Court
(CV-98-238)

(Filed July 13, 2001)

HOUSTON, Justice.

In July 1998, Scott Brooks sued Southern Manufactured Homes, Inc., and Horton Homes, Inc. (hereinafter together referred to as "Horton Homes"), seeking damages based on claims that arose out of his purchase of a manufactured home. The case proceeded to trial, and the jury awarded Brooks compensatory damages of $150,000 and punitive damages of $600,000.

Horton Homes appeals from the judgment entered on the jury's verdict, raising several issues: (1) whether the trial court erred in allowing the breach-of-implied-warranty claim to go to the jury; (2) whether the court erred in allowing the wanton-repair claim and the related punitive-damages issue to go to the jury; (3) whether the court erred in allowing Brooks's attorney to question the Horton Homes representative about other lawsuits and consumer complaints that had been filed against Horton Homes; (4) whether the $150,000 award of compensatory damages was excessive; (5) whether the court erred in assessing, against Horton Homes, attorney fees in the amount of $34,612.50 and costs in the amount of $5,340.03; and (6) whether the $600,000 award of punitive damages was excessive.

In August 1997, Brooks specially ordered a manufactured home from Factory Direct Homes, Inc. ("Factory Direct Homes"), a dealer in Montgomery. Horton Homes manufactured the home for Brooks. In September 1997, the home was delivered. Brooks executed a purchase contract and financed the purchase of the home. The purchase price was $63,414.90.

In October 1997, Brooks and his family moved into the home. They immediately began experiencing problems – for example, water from the washer would back up into the kitchen sink when it was discharged from the washer; water dripped under the house; floors were not level; and the shower stall cracked. Additional problems soon developed – when the kitchen cabinets began to warp and come apart, Brooks investigated and found that the dishwasher was leaking because a hole had been drilled through it; the floor buckled near the washer;

plasterboard and floor covering in the utility room turned different colors; water leaked in the wall between the kitchen and the utility room; and the furnace was leaning.

Brooks reported the problems to Factory Direct Homes, which corrected some of the problems (replacing the shower stalls and the dishwasher) and attempted to correct the other problems. In the spring of 1998, Factory Direct Homes went out of business, and in early May 1998 Brooks contacted Horton Homes directly regarding the problems he was continuing to have with the home. On two occasions (May 30, 1998, and June 20, 1998), Horton Homes sent service crews to the Brooks home to correct the problems. However, the service crews were unsuccessful in completing the necessary repairs, and, in fact, according to Brooks's testimony, the home was in worse condition after the service crew left on June 20, 1998, than when they arrived.

Brooks testified that when he arose on the morning after the repairs, i.e., on Sunday, June 21, 1998, which was Father's Day, furnishings were still where the service crew had moved them – the kitchen table was still in the den, the refrigerator was still in the dining room, and the freezer was still outside. He said that the dishwasher no longer worked because it had been damaged when a cabinet fell on it; that the stove had a gas leak; that canned goods were stacked on the kitchen counters; that the new floor covering was wrinkled and had big gouges around the perimeter; that the new flooring was soft and that a hole had been accidentally drilled in the new flooring and had been filled with wood putty; that the trim had not been replaced; and that debris was stacked

by the side of the house. Brooks testified that he telephoned Horton Homes on several occasions, but that no one returned to complete the repairs that were begun on June 20, 1998, until after he had sued.

On July 14, 1998, Brooks filed a multi-count complaint against Horton Homes.[1] After a trial, the jury awarded damages to Brooks, and the trial court entered a judgment on the verdict. The court denied Horton Homes' motion for a judgment as a matter of law. This appeal followed.

The case was submitted to the jury on the claims of breach of express warranty, breach of implied warranty, violation of the Magnuson-Moss Warranty Act,[2] and wanton repair.[3]

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[1] Brooks's original complaint against Horton Homes contained nine counts – counts alleging breach of express warranty, breach of implied warranty, violation of the Magnuson-Moss Warranty Act, negligent construction, wanton construction, negligent repair, wanton repair, fraudulent concealment, and misrepresentation. Brooks later amended the complaint to add George Morgan as a defendant and to state three counts against him – negligent transportation, delivery, and set-up; wanton transportation, delivery, and set-up; and failure to disclose. Brooks amended the complaint a second time to add three counts against Horton Homes – counts alleging "misleading warranty under Magnuson-Moss Warranty Act," breach of warranty, and violation of the Magnuson-Moss Warranty Act.

[2] The Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301 through 2312, applies to mobile homes. *Liberty Homes, Inc. v. Epperson*, 581 So. 2d 449, 453 (Ala. 1991).

[3] The remaining counts against Horton Homes were either withdrawn by Brooks or were disposed of by a judgment as a

First, Horton Homes contends the trial court erred when it allowed the breach-of-implied-warranty claim to go to the jury. Generally, implied warranties apply only to the seller, not the manufacturer. *See Ex parte General Motors Corp.*, 769 So. 2d 903, 910 (Ala. 1999). However, implied warranties can apply to the manufacturer when, as in this case, the product has been specially manufactured for a particular customer and the manufacturer can reasonably expect the customer to be affected by any problems with the product. *See Liberty Homes, Inc. v. Epperson*, 581 So. 2d 449, 453 (Ala. 1991). The evidence indicates Brooks specially ordered the manufactured home and that his name appeared on the paperwork that accompanied the home as it moved along the manufacturing line.

In its "Limited One-Year Warranty" contained in the "Home Owner's Manual," Horton Homes, by conspicuous language, purported to exclude all implied warranties.[4] Horton Homes argues that this fact distinguishes

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matter of law. At the conclusion of the trial, Brooks dismissed all claims against George Morgan, and those claims were not submitted to the jury.

[4] The "LIMITED ONE-YEAR WARRANTY," found on page 69 of the "Home Owner's Manual," stated, in part:

> "This warranty gives you specific legal rights and you may also have other legal rights which vary from state to state. Horton Homes, Inc. makes the foregoing warranty expressly IN LIEU OF ANY OTHER EXPRESS OR IMPLIED WARRANTY, INCLUDING ANY IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS, WHICH IMPLIED WARRANTIES ARE HEREBY EXPRESSLY EXCLUDED, and expressly in lieu of any other obligation on the part of the manufacturer."

the present case from *Epperson* because, it says, in *Epperson* the manufacturer did not exclude any implied warranties. However, while the *Epperson* opinion, 581 So. 2d at 453, notes that the "Home Owner's Manual" included a limitation of warranty, it does not indicate the wording of that limitation of warranty. Therefore, *Epperson* does not indicate whether the manufacturer excluded implied warranties. Additionally, no issue regarding the effect of an exclusion of implied warranties on Epperson's claim alleging breach of implied warranties was raised or addressed in this Court's opinion in *Epperson*.[5]

The issue we now must address is whether Horton Homes' purported exclusion of implied warranties in the "Limited One-Year Warranty" contained in the "Home Owner's Manual" precludes Brooks's breach-of-implied warranty claim. In the portion of his complaint alleging a breach of implied warranty, Brooks referred to 15 U.S.C. § 2308(a), a portion of the Magnuson-Moss Warranty Act:

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[5] In *Southern Energy Homes, Inc. v. Washington*, 774 So. 2d 505, 511, n.1 (Ala. 2000), Washington contended that Southern, the manufacturer, was liable under implied warranties because he had specially ordered the mobile home that Southern Energy Homes had manufactured. In *Washington*, 774 So. 2d at 509, the one-year warranty conspicuously purported to exclude implied warranties. This Court affirmed the trial court's judgment entered on the jury's verdict awarding damages to Washington. One of the claims submitted to the jury alleged breach of implied warranties. However, no issue regarding the effect of the purported exclusion of implied warranties on Washington's claim alleging breach of implied warranties was raised or addressed in this Court's opinion in *Washington*.

"§ 2308. Implied warranties

"(a) Restrictions on disclaimers or modifications

"*No supplier may disclaim* or modify (except as provided in subsection (b) of this section) *any implied warranty to a consumer with respect to such consumer product if (1) such supplier makes any written warranty to the consumer with respect to such consumer product,* or (2) at the time of sale, or within 90 days thereafter, such supplier enters into a service contract with the consumer which applies to such consumer product."

(Emphasis added.) The term "written warranty" is defined in 15 U.S.C. § 2301(6):

"(6) The term 'written warranty' means –

"(A) any written affirmation of fact or written promise made in connection with the sale of a consumer product by a supplier to a buyer which relates to the nature of the material or workmanship and affirms or promises that such material or workmanship is defect free or will meet a specified level of performance over a specified period of time. . . .

". . . .

"which written affirmation, promise, or undertaking becomes part of the basis of the bargain between a supplier and a buyer for purposes other than resale of such product."

In this case, Brooks specially ordered a double-wide manufactured home. When Horton Homes manufactured this home for Brooks, in September 1997, its policy was for the production-line manager and the final-finish supervisor on the line where the home was manufactured

to sign a "Certificate of Quality Assurance"; that certificate included the statement "Your new home has been carefully inspected to ensure quality and cleanliness" and included the phrase "Built for a Lifetime!" This certificate was also signed by the cleaning-crew supervisor and by crew members.

Horton Homes manufactured Brooks's home on September 2, 1997. On that date, two "Certificates of Quality Assurance" were signed for the Brooks home (one for each section of the double-wide), and they were placed on the kitchen counter of the home. The first time Brooks saw the home was approximately September 8, 1997, when the home was delivered to his lot. Brooks testified that when he entered the kitchen, he saw the certificates and read them and that he relied on the certificates when he executed the paperwork to purchase the home. Brooks testified that if he had known that the production-line manager had signed the certificates in blank, he would have made further inspection before purchasing the home. Thus, we conclude that these "Certificates of Quality Assurance" are "written warranties" within the meaning of the Magnuson-Moss Warranty Act and that Horton Homes' purported disclaimer of implied warranties is ineffective.[6] Thus, the trial court properly submitted the breach-of-implied-warranty claim to the jury.

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[6] In *Auburn Ford, Lincoln Mercury, Inc. v. Norred*, 541 So. 2d 1077 (Ala. 1989), Lisa Norred purchased a used automobile and an "Extended Service Contract" from Auburn Ford. This Court, relying on 15 U.S.C. § 2308(a), stated that while Auburn Ford's "as is" disclaimer would normally be sufficient to preclude Norred's breach-of-warranty claim, her purchase of the service contract rendered Auburn Ford's disclaimer ineffective to exclude any implied warranties. 541 So. 2d at 1080.

Second, Horton Homes contends the trial court erred when it submitted to the jury the wanton-repair claim and the related claim for punitive damages. Horton Homes argues that Brooks is not entitled to recover damages for mental anguish under a wanton-repair claim because, it argues, the only "injury" was to the product itself and Brooks failed to show that he suffered "a physical injury as a result of [Horton Homes'] negligent conduct, or [that he was] placed in immediate risk of physical harm by that conduct." *Ex parte Grand Manor, Inc.*, 778 So. 2d 173, 179 (Ala. 2000).

While our review of the evidence does show that Brooks failed to prove he suffered a physical injury as a result of wanton conduct on the part of Horton Homes and failed to prove that he was placed in immediate risk of physical harm by Horton Homes' conduct, our review also shows that Horton Homes did not preserve for appellate review the issue whether the wanton-repair claim and the request for punitive damages based on that claim should have been sent to the jury and whether mental-anguish damages were recoverable in the present case.

In *BIC Corp. v. Bean*, 669 So. 2d 840, 844 (Ala. 1995), this Court stated:

> " 'Unchallenged jury instructions become the law of the case. *Louisville & Nashville R.R. v. Atkins*, 435 So. 2d 1275 (Ala. 1983).' *Clark v. Black*, 630 So. 2d 1012, 1017 (Ala. 1993). 'The jury is bound to follow such instructions, even if they are erroneous. *Lee v. Gidley*, 252 Ala. 156, 40 So. 2d 80 (1949) (erroneous instructions became the law of the case, and a judgment entered on

the jury's verdict comporting with those instructions would not be reversed on appeal).' 630 So. 2d at 1017."

In its jury charge, the trial court stated:

"[Brooks] contends that [Horton Homes] wantonly repaired the mobile home. I gave you a brief explanation of wantonness before. Here is a more thorough definition of the term. Wantonness is a conscious doing of some act or omission of some duty under knowledge of existing conditions and conscious that from the doing of such act or omission of such duty, an injury will likely or probably result. Before a party can be said to be guilty of wanton conduct, it must be shown that with reckless indifference to the consequences, he either consciously or intentionally did some wrongful act or consciously omitted some known duty which produced an injury.

"If you are reasonably satisfied from the evidence that [Brooks] is entitled to recover from [Horton Homes], then you should award [Brooks] reasonable compensation. Under the circumstances of this case, compensatory damages may include the following: (A) the reasonable cost to repair any defects or damage in the home caused by [Horton Homes'] repair attempts or by [Horton Homes'] breach of warranty, should you find those exist; and (B) such amounts as you determine would reasonably and fairly compensate [Brooks] for such mental anguish, if any, as you are reasonably satisfied from the evidence that he has suffered as a proximate consequence of [Horton Homes'] breach of duty."

The trial court did not separately charge the jury on compensatory damages for breach of warranty and wanton repair. In *New Plan Realty Trust v. Morgan*, [Ms. 1981944, December 29, 2000[___ So. 2d ___, ___ (Ala. 2000), this Court stated:

> "As already mentioned in this opinion, the trial judge instructed the jury on damages for mental anguish. . . . New Plan did not object to this instruction. Thus, the jury was authorized to include damages for mental anguish as part of the compensatory damages award to Morgan."

At the conclusion of the jury charge, the following exchange occurred:

> "THE COURT: Is the plaintiff satisfied with the Court's charge to the jury?
>
> "[BROOKS'S ATTORNEY]: Satisfied.
>
> "THE COURT: Is defense satisfied with the Court's charge to the jury?
>
> "[HORTON HOMES' ATTORNEY]: Your Honor, there are certain objections and exceptions we'd like to make at this time. The Court failed to give the requested charges 17 and 18 which were presented by [Horton Homes]. We take exception to that failure.
>
> "THE COURT: So noted.
>
> "[HORTON HOMES' ATTORNEY]: The Court did charge [by] request of [Brooks] number 1, 2, 4, 5, 8, 9, 10, 11, 12, 13, 14, 15, 41, 42, 43, and 44, and we take exception to the giving of all of those charges.

"THE COURT: Do you contend that those are not correct statements of the law?

"[HORTON HOMES' ATTORNEY]: They are either not correct statements of the law or not adapted to the facts of this case.

"THE COURT: So noted."

The record does not contain a copy of the written jury instructions. Thus, we cannot determine if, in fact, Horton Homes objected to the trial court's instructions to the jury on the wanton-repair claim and the punitive-damages issue or on the award of mental-anguish damages on the wanton-repair claim or, if it did, specifically what is objections were. In *Coleman v. Taber*, 572 So. 2d 399, 401-02 (Ala. 1990), this Court stated:

> "This Court is bound by the record. . . . It is well established that an appellant has the duty to check the record and ensure its correctness before submitting it on appeal. Here, the Colemans did not invoke Rule 10(f), Ala. R. App. P., which provides for the correction or modification of the record on appeal, provided, of course, that there is a record.
>
> ". . . .
>
> " . . . Requiring a party to state to the trial court the grounds for his objection to a jury instruction affords the trial court an opportunity to correct any error in its charge before it becomes error with injury to reversal. The failure to object and to state grounds for the objection is fatal to appellate review of the alleged error.
>
> "The objection made by the Coleman's counsel in this case was not sufficiently specific.

> Although Rule 51[, Ala. R. Civ. P.,] does not contemplate that the objecting party [will] deliver a discourse on the applicable law of the case, he must adequately state specific grounds for his objection in order to preserve for appellate review an erroneous instruction. The rule states that merely stating the matter to which a party objects is not enough; grounds must be stated in other than general terms for the objection to properly preserve the error for appeal. We have said that an objection designating only the subject treated by the court in its oral charge is insufficient to preserve the error."

(Citations omitted.)

Because Horton Homes did not adequately object to the jury instructions on the wanton-repair claim and the punitive-damages issue and on the claim for damages for mental anguish based on the wanton-repair claim, those instructions became the law of the case; a judgment entered on a jury verdict that is compatible with those instructions will not be reversed on appeal. *BIC Corp.*, 669 So. 2d at 844.[7]

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[7] Brooks argues that Horton Homes has failed to recognize the distinction between a claim based on negligent/wanton *construction or manufacture* and a claim based on negligent/wanton *repair*. Brooks points out that in *Dairyland Ins. Co. v. General Motors Corp.*, 549 So. 2d 44 (Ala. 1989), where the only "injury" was to the product itself, this Court affirmed a summary judgment in favor of General Motors, the manufacturer of an automobile, on a negligent-manufacture claim, but reversed a summary judgment in favor of the automobile dealer on a negligent-repair claim.

In a more recent case, *Wal-Mart Stores, Inc. v. Bowers*, 752 So. 2d 1201 (Ala. 1999), this Court reversed a judgment based on a

Third, Horton Homes contends the trial court erred when it permitted Brooks to question Jimmy Dean Holton, Horton Homes' representative, about other lawsuits and consumer complaints filed against Horton Homes. At trial, the following exchange occurred between Holton and Brooks's attorney:

> "[BROOKS'S ATTORNEY]: . . . [Horton Homes] state[s] that if this home is shown to contain a defect or malfunction, [Brooks] did not allow [Horton Homes] a reasonable number of attempts to remedy said defects.
>
> "Is that Horton's position in this litigation?
>
> "[HOLTON]: Response is probably indicated because we were not allowed to continue to try to solve his problem, and he refused service on July 17th, I think.
>
> ". . . .
>
> "[BROOKS'S ATTORNEY]: Sir, my question is simply, is it Horton's position in this case that, quote, if the home is shown to contain a defect or malfunction, [Brooks] did not allow [Horton Homes] a reasonable number of attempts to remedy said defects?

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jury verdict, holding that the trial court had erred when it submitted the plaintiff's request for mental-anguish damages to the jury, because his only claim was based on damage to property and he had suffered no physical injury and was not placed in any immediate risk of physical harm.

However, because the trial court's jury instructions became the law of the case, we need not now address the issue dealt with in *Dairyland Insurance Co.* and *Bowers*.

"[HOLTON]: Yes.

". . . .

"[BROOKS'S ATTORNEY]: How long does Horton contend that Mr. Brooks should have continued to wait for Horton to solve his problems?

"[HOLTON]: Well, from the time we got involved in it, we only had something like May 5th to – we had vacation. I mean, under 50 days, I think it was.

"[BROOKS'S ATTORNEY]: How much longer beyond July 14, 1998, do you contend Mr. Brooks should have continued to wait?

"[HOLTON]: I don't have an answer for that."

Thereafter, the parties and the trial court held an extensive discussion on the record, but outside the presence of the jury, on Horton Homes' motion in limine, seeking to exclude evidence of other lawsuits or complaints filed against Horton Homes. The trial court ruled that there was probative value to allowing Brooks to question the Horton Homes' corporate representative about the number of other lawsuits and complaints similar to Brooks's and concluded that that ruling was supported by *Southern Energy Homes, Inc. v. Washington*, 774 So. 2d 505, 515-16 (Ala. 2000).[8] Horton Homes excepted to this ruling.

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[8] In *Southern Energy Homes*, 774 So. 2d at 515-16, this Court stated:

"McNutt testified on direct examination that Southern would have responded if Washington and

Although Horton Homes excepted to the trial court's ruling denying its motion in limine, it did not object when Brooks questioned Holton regarding other lawsuits

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> his wife had actually made any of the telephone calls that they alleged. McNutt reaffirmed this assertion on cross-examination and testified further that Southern did not let any consumer complaints go unanswered. In response, Washington questioned the representative about documents, filed with the Alabama Manufactured Housing Commission, that contained allegations from 113 other homeowners that Southern had not responded to their complaints. . . . The trial court expressly limited Washington's use of the documents to impeachment purposes and prohibited Washington from using the documents for proving the truth of the matters asserted therein. In light of the fact that McNutt attempted to bolster his testimony by asserting that Southern never lets any customer complaint go unanswered, the trial court did not abuse its discretion in determining that the prejudicial impact of the impeachment questioning did not substantially outweigh the probative value of those questions."

(Citations omitted.) In the present case, Horton Homes' position was that Brooks did not wait long enough before suing for it to have an opportunity tó repair the defects. It was Brooks' position, while arguing against the motion in limine, that he should be allowed to question the Horton Homes' representative about other lawsuits and complaints that alleged that Horton Homes had failed to make repairs. The trial court agreed.

Additionally, we note that in its instructions to the jury the trial court stated:

> "In regards to the other lawsuits filed against [Horton Homes], ladies and gentlemen, the Court instructs you as follows: The complaint in a lawsuit is

and complaints. The following exchange occurred while Brooks questioned Holton:

> "[BROOKS'S ATTORNEY]: How many times has Horton been sued for failure to repair defects in homes that customers request?
>
> "[HORTON HOMES' ATTORNEY]: Your Honor, we have a stipulation that there have been 185 lawsuits in which Horton was named and I talk collectively, Southern/Horton, were named in which there was an allegation of a repair that was not complete or not properly done.
>
> "THE COURT: Ladies and gentlemen, I told you earlier and I'll tell you again now that a stipulation stands as a proven fact that requires no further proof. So counsel for [Horton Homes] has stipulated that 185 lawsuits have been filed against this company for failure to effect repairs or to do warranty work. Is that right?
>
> "[HORTON HOMES' ATTORNEY]: That was the allegations, that's right.

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no more than a means of commencing an action. And the mere filing thereof does not import – let me start it again.

"The complaint in a lawsuit is no more than a means of commencing an action. And the mere filing thereof does not import verity even in the proceeding in which it was filed.

"Some of the evidence in this case, ladies and gentlemen, namely testimony that other lawsuits have been filed against [Horton Homes], has been received in evidence for a limited purpose. And you should consider this evidence along with all the other evidence in the case material to the issues but only for the purpose for which it was received."

". . . .

"[HORTON HOMES' ATTORNEY]: Excuse me, Your Honor. Our stipulation, what we were asked to do is determine within the last five years. And that is the number that represents the last five years.

"[BROOKS'S ATTORNEY]: That was the next question that I was going to ask him.

"[HORTON HOMES' ATTORNEY]: Our stipulation is that with regard to these named companies collectively, 185 lawsuits alleging warranty issues within the last five years, which was the time frame the Court gave us.

"THE COURT: Correct.

". . . .

"[BROOKS'S ATTORNEY]: Now, in each state is there an administrative agency that enforces the regulations of the Department of Housing and Urban Development concerning manufactured homes?

"[HOLTON]: Yes.

"[BROOKS'S ATTORNEY]: Do those agencies typically receive complaints from consumers about problems they have with manufactured homes?

"[HOLTON]: Yes.

"[BROOKS'S ATTORNEY]: And within the last five years, how many complaints have been filed against Horton Homes and Southern Manufactured Housing just in the state of Alabama?

"[HORTON HOMES' ATTORNEY]: Your Honor, I don't believe we addressed that. We provided those to [Brooks's attorney]. Do you

have a number? Do you know how many there are we gave you?

"[BROOKS'S ATTORNEY]: I have a list of what was provided.

"THE COURT: Let's just test the witness's knowledge, which is what we're supposed to be doing here.

"[BROOKS'S ATTORNEY]: Do you know how many have been filed just in the State of Alabama within the last five years where there is an allegation of failure to make repairs?

"[HOLTON]: No sir.

"THE COURT: Now, is there a stipulation?

"[HORTON HOMES' ATTORNEY]: If [Brooks's attorney] knows what the number is that we gave him, I'll take his number. The number we come up with is 53. Once again, what the Court asked us to do was produce the last five years of those, and there are 53 of those.

"THE COURT: So stipulated.

"[HORTON HOMES' ATTORNEY]: Once again, where there was an issue raised about repair."

Additionally, Brooks asked Holton if Horton Homes had, within the five-year period before September 1997, received any complaints that alleged the repair crews had actually done additional damage when attempting to

make repairs. Holton answered, "Not to my knowledge." Then Brooks displayed, by an overhead projector, two complaints that contained such allegations, and Horton Homes did not object. In *Odom v. Schofield*, 480 So. 2d 1217, 1218 (Ala. 1985), this Court stated:

> "We have held previously that a movant who receives an adverse ruling on a motion to exclude evidence, made *in limine*, preserves the adverse ruling for post-judgment and appellate review *only* if he objects to the introduction of the evidence when it is offered at trial, *and* if he assigns specific grounds for the objection."

Thus, Horton Homes failed to preserve this issue for review.

Fourth, Horton Homes contends that the award of $150,000 in compensatory damages was excessive. Unrefuted evidence indicated that if Horton Homes made approximately $12,000 in repairs then the problems with Brooks's manufactured home (those that were caused by, or were the responsibility of, Horton Homes) would be cured.[9] Horton Homes contends that the $150,000 award must have included an award of $138,000 for mental anguish, and that such an award was excessive.

However, in *Southern Energy Homes, Inc. v. Washington*, 774 So. 2d at 518-19, this Court affirmed an award of

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[9] Brooks retained Randall Chesser to inspect his mobile home for defects. Chesser prepared a "cost-to-cure (repair) analysis," wherein he found that the manufacturer should be responsible for $12,295 in repairs and that the dealer should be responsible for $4,900 in repairs. Chesser testified at trial, and his "cost-to-cure (repair) analysis" was introduced into evidence.

$375,000 in compensatory damages based on the plaintiff Washington's purchase of a custom-built Mobile Home for $19,320. This Court stated, "Evidence indicating that Washington experienced such feelings [as he had testified to] over such an extended period supports the jury's finding of mental anguish under the standard established in [*Kmart Corp. v. Kyles*, 723 So. 2d 572, 578-79 (Ala. 1998)]." 774 So. 2d at 519. In *Kmart Corp. v. Kyles*, 723 So. 2d at 578, this Court stated:

> "Under Alabama law, the presence of physical injury or physical symptoms is not a prerequisite for a claim for damages for mental anguish. 'The plaintiff is only required to present some evidence of mental anguish, and once the plaintiff has done so, the question of damages for mental anguish is for the jury.' The amount of the jury's award is left to the jury's sound discretion, and the jury's award will not be set aside absent a clear abuse of discretion. Also, a jury's verdict is presumed correct, and that presumption is strengthened by the trial court's denial of a motion for new trial. But, here we must address the strength of the presumption in light of the plaintiff's failure to testify about the nature of her alleged mental anguish.
>
> ". . . .
>
> "We now clearly allow the testimony of a witness as to his or her mental anguish. The question thus remains, in the present era, when we permit a witness to offer evidence as to the witness's own mental anguish, is indirect evidence of mental anguish alone sufficient to support a substantial verdict? We answer this

> question in the negative. We give stricter scrutiny to an award of [mental-anguish damages] where the victim has offered little or no direct evidence concerning the degree of suffering he or she has experienced."

(Citations omitted.)

Mental anguish includes anxiety, embarrassment, anger, fear, frustration, disappointment, worry, annoyance, and inconvenience. *Volkswagen of America, Inc. v. Dillard*, 579 So. 2d 1301, 1307 (Ala. 1991); *B & M Homes, Inc. v. Hogan*, 376 So. 2d 667, 673 (Ala. 1979). At trial, Brooks testified to the following:

> "Q. Scott, what effect has this had on you personally?
>
> "A. It's been very stressful.
>
> "Q. In what way?
>
> "A. Well, just a fear that I'm going to be stuck with this situation that – you know, when I first started talking to the dealer, they were saying, 'Don't worry Mr. Brooks, we're going to take care of it.' And I went eight months with them. And the same things that they did, the factory came in and started doing. It was just a repeat. They didn't even see anything wrong with the way they were putting my floor down. I can't live with it like that. I mean, this was a brand new house. I bought a brand new house. I paid a substantial amount of money for this house.
>
> "Q. How much did the house cost?
>
> "A. It was $63,000.
>
> "Q. Go ahead.

"A. And I was – I felt like I was getting jerked around by these people. All I asked them to do was fix my house. I didn't ask for four of them to take ten months to fix my house. It didn't matter to me if the people did it or the factory did it. All I wanted was my house to be repaired so I could go on with my life. It was very stressful. . . .

"Q. Have you lost any sleep about this?

"A. Yes, sir, I have.

"Q. Have you cried?

"A. Yes, sir, I have.

"Q. Do you feel like that they dealt with you honestly in what –

"A. No, sir, I do not."

At trial, Brooks's wife testified that Brooks "was a nervous wreck" and "stayed stressed out" and "[got] edgy about stuff." She stated that he would get up at 2:00, 3:00, or 4:00 in the morning and just sit on the couch and that when she would get up and ask him what was wrong he would tell her that "he didn't know what [they] were going to do" because "[they had worked] very hard for what little bit [they did] have and he just didn't know . . . if [they were] going to have to end up fixing it [themselves] or what." Brooks's wife also testified that when they would have guests over to their home, Brooks "would just get real upset and you could see tears in his eyes and sometimes running down his face" when they would begin talking about the problems with the home. Thus, we conclude that Brooks presented sufficient evidence to justify the jury's award of approximately

$138,000 in mental-anguish damages. *Southern Energy Homes, Inc. v. Washington,* supra.

Fifth, Horton Homes contends the trial court erred in awarding $34,612.50 in attorney fees and $5,340.03 in costs. Brooks's attorney moved for an award of attorney fees and costs and filed a supporting affidavit. The Magnuson-Moss Act, 15 U.S.C. § 2310(d)(2), provides for the recovery of attorney fees for violation of written warranties:

> "If a consumer finally prevails in any action brought under paragraph (1) of this subsection, he may be allowed by the court to recover as part of the judgment a sum equal to the aggregate amount of cost and expenses (including attorneys' fees based on the actual time expended) determined by the court to have been reasonably incurred by the plaintiff for or in connection with the commencement and prosecution of such action, unless the court in its discretion shall determine that such an award of attorneys' fees would be inappropriate."

Horton Homes filed nothing in opposition to this motion and affidavit and, at the hearing on the motion, Horton Homes did not specifically identify any work or expense claimed by the attorney that was unnecessary. Horton Homes bore the burden of objecting to specific items or charges for amounts for work that it considered improper, and when it declined to identify any work or expense that it considered unnecessary the trial court could properly treat those amounts as uncontroverted. *See Lewis, Wilson, Lewis, & Jones, Ltd. v. First Nat'l Bank of Tuscumbia,* 435 So. 2d 20, 23 (Ala. 1983); *Costa & Head Dev. Co. v. Mayer Elec. Supply Co.,* 562 So. 2d 1323, 1325 (Ala.

Civ. App. 1989). Thus, we find no abuse of discretion on the part of the trial court in awarding attorney fees in the amount of $34,612.50 and costs in the amount of $5,340.03.

Finally, Horton Homes contends that the $600,000 award of punitive damages was excessive. Horton Homes has properly challenged the constitutionality of the punitive-damages award as being a denial of the due process guaranteed by the Fourteenth Amendment to the Constitution of the United States and Art. I, § 13, of the Constitution of Alabama of 1901; and as violating the "excessive-fines" provision of the Eighth Amendment of the Constitution of the United States and Art. I, § 15, of the Constitution of Alabama.

In *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, [Ms. No. 99-2035, May 14, 2001] ___ U.S. ___ (2001), the United States Supreme Court wrote:

> "Despite the broad discretion that States possess with respect to the imposition of criminal penalties and *punitive* damages, the Due Process Clause of the Fourteenth Amendment to the Federal Constitution imposes substantive limits on that discretion. That Clause makes the Eighth Amendment's prohibition against excessive fines and cruel and unusual punishments applicable to the States. *Furman v. Georgia*, 408 U.S. 238 (1972) (*per curiam*). The Due Process Clause of its own force also prohibits the States from imposing 'grossly excessive' punishments on tortfeasors. [*BMW of North America, Inc. v.*] *Gore*, 517 U.S. [559,] at 562 [(1996)]; *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 453-455 (1993) (plurality opinion).

"The Court has enforced those limits in cases involving deprivations of life . . . and deprivations or property. . . .

"In these cases [cases cited in the preceding paragraph for the proposition stated there (but omitted from this quotation)], the constitutional violations were predicated on judicial determinations that the punishments were 'grossly disproportional to the gravity of . . . [the] defendant[s'] offense[s].' . . . We have recognized that the relevant constitutional line is 'inherently imprecise' . . . rather than one 'marked by a simple mathematical formula.' But in deciding whether the line has been crossed, we have focused on the same general criteria: the degree of the defendant's reprehensibility or culpability; the relationship between the penalty and the harm to the victim caused by the defendant's actions; and the sanctions imposed in other cases for comparable misconduct. Moreover, and of greater relevance for the issue we address today, in each of these cases we have engaged in an independent examination of the relevant criteria.

" . . . ' . . . [T]he question whether a fine is constitutionally excessive calls for the application of a constitutional standard to the facts of a particular case, and in this context *de novo* review of that question is appropriate.'

" . . . [I]n *Ornelas [v. United States*, 517 U.S. 690 (1996)], we held that trial judges' determinations of reasonable suspicion and probable cause should be reviewed *de novo* on appeal. The reasons we gave in support of that holding are equally applicable in this case. First, as we

observed in *Ornelas*, the precise meaning of concepts like 'reasonable suspicion' and 'probable cause' cannot be articulated with precision; they are 'fluid concepts that take their substantive content from the particular contexts in which the standards are being assessed.' *Id.*, at 696. That is, of course, also a characteristic of the concept of 'gross excessiveness.' Second, 'the legal rules for probable cause and reasonable suspicion acquire content only through application. Independent review is therefore necessary if appellate courts are to maintain control of, and to clarify, the legal principles.' *Id.*, at 697. Again, this is also true of the general criteria set forth in *Gore; they will acquire more meaningful content through case-by-case application at the appellate level. 'Finally,* de novo *review tends to unify precedent' and 'stabilize the law.' Id.*, at 697-698. JUSTICE BREYER made a similar point in his concurring opinion in *Gore*:

> " '*Requiring the application of law,* rather than a decisionmaker's caprice, *does more than simply provide citizens notice of what actions may subject them to punishment; it also helps to assure the uniform treatment of similarly situated persons that is the essence of law itself.*' 517 U.S., at 587.

"Our decisions in analogous cases, together with the reasoning that produced those decisions, thus convince us that *courts of appeals should apply a* de novo *standard of review when passing on district courts' determinations of the constitutionality of punitive damages awards.*

"III

" 'Unlike the measure of actual damages suffered, which presents a question of historical or predictive fact, the level of punitive damages is not really a "fact" "tried" by the jury.' Gasperini v. Center for Humanities, Inc., 518 U.S. 415, 459 (1996) (SCALIA, J., dissenting). *Because the jury's award of punitive damages does not constitute a finding of 'fact,' appellate review of the District Court's determination that an award is consistent with due process does not implicate . . . Seventh Amendment concerns. . . .*

". . . .

"Differences in the institutional competence of trial judges and appellate judges are consistent with our conclusion. In *Gore*, we instructed courts evaluating a punitive damages award's consistency with due process to consider three criteria: (1) the degree or reprehensibility of the defendant's misconduct, (2) the disparity between the harm (or potential harm) suffered by the plaintiff and the *punitive* damages award, and (3) the difference between the *punitive* damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. 517 U.S., at 574-575. Only with respect to the first *Gore* inquiry do the district courts have a somewhat superior vantage over courts of appeals, and even then the advantage exists primarily with respect to issues turning on witness credibility and demeanor. Trial courts and appellate courts seem equally capable of analyzing the second factor. And the third *Gore* criterion, which calls for a broad legal comparison, seems more suited to the expertise of appellate courts. Considerations of institutional competence

therefore fail to tip the balance in favor of deferential appellate review.

"IV

". . . .

"We have made these comments on issues raised by application of the three *Gore* guidelines to the facts of this case, not to prejudge the answer to the constitutional question, but rather to illustrate why we are persuaded that the Court of Appeals' answer to that question may depend upon the standard of review. The *de novo* standard should govern its decision. Because the Court of Appeals applied a less demanding standard in this case, we vacate the judgment and remand the case for further proceedings consistent with this opinion."

(Emphasis added.) (Some citations omitted.)

Previously, in reviewing claims that punitive-damages awards were excessive, we have given deference to the jury's award. "In remitting a punitive damages award, we must remit *only that amount in excess of the maximum amount that a properly functioning jury could have awarded.*" *Big B, Inc. v. Cottingham*, 634 So. 2d 999, 1006 (Ala. 1993) (emphasis added).

The Alabama Legislature in Acts 1987, Act No. 87-185, enacted what became Ala. Code 1975, § 6-11-23(a) ("No presumption of correctness shall apply as to the amount of punitive damages awarded by the trier of the fact.") and § 6-11-24(a) ("On appeal, no presumption of correctness shall apply to the amount of punitive damages awarded."). This Court declared these sections

unconstitutional in *Armstrong v. Roger's Outdoor Sports, Inc.*, 581 So. 2d 414 (Ala. 1991), with Maddox, J., dissenting, at 423-27; Houston, J., dissenting, at 427-35; and Steagall, J., dissenting, at 435-36. Today, 10 years later, relying on the United States Supreme Court's decision in *Cooper Industries*, this Court will begin applying the standard of review directed by the Legislature in 1987.

In applying the de novo standard of review to Horton Homes' constitutional challenge to the amount of the punitive-damages award, we must review the evidence and the law without deference to the jury's award or to the trial court's rulings. *Black's Law Dictionary*, pp. 94 ("appeal de novo") and 447 ("de novo") (7th ed. 1999). In reviewing the punitive-damages award de novo, we note that the plaintiff had approximately $12,000 in actual economic loss; that he was awarded $150,000 in compensatory damages; and that we have affirmed that award. The plaintiff's attorney was awarded attorney fees of $34,612.50 and costs in the amount of $5,340.03, to be paid by the defendants, and we have affirmed those awards. Therefore, there is no need to have punitive damages as an augmentation of compensatory damages to cover the reasonable costs of litigation or in any way to compensate the plaintiff. The compensatory-damages award made the plaintiff whole.

Ala. Code 1975, § 6-11-21, as amended by Act No. 99-358, Ala. Acts 1999, became effective more than a year before this action was tried (June 27-30, 2000). Section 6-11-21(a), with exceptions not applicable in this case, provides that "in all civil actions where an entitlement to punitive damages shall have been established under applicable laws, no award of punitive damages shall

exceed three times the compensatory damages of the party claiming punitive damages or five hundred thousand dollars ($500,000), whichever is greater." The "effective date" of Act No. 99-358 was June 7, 1999, but § 4 of that Act, which was not codified, provided: "This act shall apply to all actions commenced more than 60 days after the effective date of this act."[10]

Horton Homes filed what it styled as "Renewed Motion for Judgment as a Matter of Law; or, in the alternative, Motion for a New Trial; or in the alternative, Motion to Alter, Amend, or Vacate the Judgment; or in the alternative, Motion for Remittitur." In that motion it made the following argument:

> "All claims for punitive damages are subject to the provisions of § 6-11-21, et seq., Ala. Code 1975, including but not limited to the statutory cap on punitive damages. *See Goodyear Tire & Rubber Co. v. Vinson*, [749 So. 2d 393] (Ala. 1999) (Hooper, C.J., concurring specially). The Alabama Supreme Court's action abolishing the legislatively created cap on punitive damages was unconstitutional and is without effect. Under the Constitution of the United States and the State of Alabama, the Alabama Supreme Court

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[10] In *Swift v. Gregory*, [Ms. 1990914, November 22, 2000] ___ So. 2d ___, ___ (Ala. 2000), this Court held: "Once the Code Commission modifies an act and the Legislature thereafter adopts a Code containing the modification, the modification has the effect of law." However, this Court finds that after the modification of Act No. 99-358 by the Code Commissioner, the Legislature did not adopt a Code containing the modification until May 1, 2001, well after the date the judgment was entered in this action. See Act No. 2001-344, Ala. Acts 2001.

> cannot abolish the cap created by the Legislature on punitive damages through judicial fiat. *See Honda Motor Co. v. Oberg*, [512 U.S. 415] (1994)."

This action is distinguishable from *Goodyear Tire & Rubber Co. v. Vinson*, 749 So. 2d 393 (Ala. 1999), because Horton Homes cited *Vinson* in its motion for a remittitur, arguing in that motion that this Court's ruling abolishing the cap on punitive damages was unconstitutional and that Brooks's claim for punitive damages was subject to the statutory cap on punitive damages. The trial court denied the motion for a remittitur; it did not reduce the punitive-damages award to $250,000. The trial court's decision not to apply the cap was an adverse ruling.

However, Horton Homes does not on appeal argue the issue raised by its motion – whether this Court's holding "abolishing the legislatively created cap on punitive damages was unconstitutional." This Court will not consider an issue not argued, except in exceptional circumstances, and we find no exceptional circumstances in this case. See *Armstrong v. Roger's Outdoor Sports, Inc.*, supra, in which there were three dissents, including one by the author of this present opinion. Therefore, the question whether *Henderson v. Alabama Power Co.*, 627 So. 2d 878 (Ala. 1993), insofar as it held unconstitutional the $250,000 cap on punitive damages violated the separation-of-powers doctrine of the Alabama Constitution is not before us. See *Goodyear Tire & Rubber Co. v. Vinson*, supra; *Ex parte Apicella*, [Ms. 1992273, March 30, 2001] ___ So. 2d ___ (Ala. 2001), and the authority cited therein. In *Cooper Industries*, ___ U.S. at ___, the United States Supreme Court held:

> "[L]egislatures enjoy broad discretion in authorizing and limiting permissible *punitive* damages awards. *Cf. Gore*, 517 U.S., at 568 ('States necessarily have considerable flexibility in determining the level of *punitive* damages that they will allow in different classes of cases in any particular case'). A good many States have enacted statutes that place limits on the permissible size of *punitive* damages awards. When juries make particular awards within those limits, the role of the trial judge is 'to determine whether the jury's verdict is within the confines set by state law, and to determine, by reference to federal standards developed under Rule 59[, Fed. R. Civ. P.,] [in Alabama state courts by reference to the standards enunciated in *Gore* and in *Green Oil Co. v. Hornsby*, 539 So. 2d 218 (Ala. 1989)], whether a new trial or remittitur should be ordered.' *Browning-Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 279 (1989). If no constitutional issue is raised, the role of the appellate court, at least in the federal system [and in the state courts in Alabama], is merely to review the trial court's 'determination under an abuse-of-discretion standard.' "

Consistent with the direction of the United States Supreme Court that the amount of a punitive-damages award be reviewed de novo when constitutional issues have been raised, this Court has reviewed actions in which punitive damages were awarded for fraud, for trespass, or for conversion; some of the awards this Court has affirmed[11] and some of them it has affirmed on the

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[11] *New Plan Realty Trust & New Plan Realty Trust of Alabama, Inc., d/b/a The Club Apartments v. Morgan*, [Ms. 1981944, Dec. 29,

condition that the plaintiff agree to a remittitur of a portion of the punitive-damages award.[12]

Following our de novo review, we direct that the plaintiff reduce the punitive-damages award to $150,000 (a remittitur of $450,000). If within 30 days Brooks files with this Court an acceptance of the remittitur, then the punitive-damages award, as reduced, will be affirmed. If he does not, then the judgment will be reversed and the case remanded for a new trial.

AFFIRMED CONDITIONALLY.

Lyons, Brown, Johnstone, Harwood, Woodall, and Stuart, JJ., concur.

Moore, C.J., concurs in part and dissents in part.

See, J., dissents.

2000] ___ So. 2d ___ (Ala. 2000); *Sheffield v. Andrews*, 679 So. 2d 1052 (Ala. 1996); *King Motor Co. v. Wilson*, 612 So. 2d 1153 (Ala. 1993); *O.K. Bonding Co. v. Milton*, 579 So. 2d 602 (Ala. 1991); *German Auto, Inc. v. Tamburello*, 565 So. 2d 238 (Ala. 1990); *Griggs v. Finley*, 565 So. 2d 154 (Ala. 1990); *Green Oil Co. v. Hornsby*, 539 So. 2d 218 (Ala. 1989); *Fruehauf Corp. v. Welch*, 519 So. 2d 502 (Ala. 1988); *Bernie Hughes Lincoln Mercury v. Merritt*, 523 So. 2d 441 (Ala. 1988); *Larry Savage Chevrolet, Inc. v. Richards*, 470 So. 2d 1168 (Ala. 1985); *Fountain-Lowrey Enters., Inc. v. Williams*, 424 So. 2d 581 (Ala. 1982); *Montgomery Lincoln-Mercury, Inc. v. Gaioni*, 402 So. 2d 928 (Ala. 1981); *Gunite Contracting Co. v. Mize*, 341 So. 2d 694 (Ala. 1977).

[12] *Chrysler Corp. v. Schiffer*, 736 So. 2d 538 (Ala. 1999); *BMW of North America, Inc. v. Gore*, 701 So. 2d 507 (Ala. 1997); *Foremost Ins. Co. v. Parham*, 693 So. 2d 409 (Ala. 1997).

MOORE, Chief Justice (concurring except as to that portion of the opinion and the judgment requiring a remittitur of punitive damages, and dissenting as to that portion).

I would affirm the judgment, without a remittitur. I respectfully dissent from the order requiring a remittitur of the punitive-damages award, because I would defer to the jury and the trial judge, who were present during the fact-finding process of the trial. I question this Court's reliance on *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, [Ms. No. 99-2035, May 14, 2001] ___ U.S. ___, 121 S.Ct. 1678, 1684 (2001), to change this Court's standard of review of punitive-damages awards. In that case, the United States Supreme Court required that federal appellate courts perform a de novo review of punitive-damages awards alleged to be excessive, to determine whether they are so large as to violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution, but that decision would not require this Court to change its standard. Also, because the Alabama Legislature has enacted tort-reform legislation, I question the appropriateness of this Court's providing a de novo review of punitive-damages awards in cases filed after the effective date of Act No. 99-358, Ala. Acts 1999, amending Ala. Code 1975, § 6-11-21.

SEE, Justice (dissenting).

I do not believe the two "Certificates of Quality Assurance" were "written warranties" within the meaning of 15 U.S.C. § 2301(6)(A); therefore, I believe Horton Homes' disclaimer was sufficient to preclude Brooks's breach-of-implied-warranty claim. See 15 U.S.C. § 2308(a)

(providing, in relevant part, that "[n]o supplier may disclaim . . . any implied warranty to a consumer with respect to such consumer product if (1) such a supplier makes any written warranty to the consumer with respect to such consumer product").

A "written warranty" is defined by the Magnuson-Moss Act as:

> "(A) any written affirmation of fact or written promise made in connection with the sale of a consumer product by a supplier to a buyer which relates to the nature of the material or workmanship and affirms or promises that such material or workmanship is defect free or will meet a specified level of performance over a specified period of time. . . .
>
> ". . . .
>
> "which written affirmation, promise, or undertaking becomes part of the basis of the bargain between a supplier and a buyer for purposes other than resale of such product."

15 U.S.C. § 2301(6)(A).

The two Certificates of Quality Assurance state that "Your new home has been carefully inspected to ensure quality and cleanliness," and that it was "Built for a Lifetime!" The majority presumes that these statements were written warranties under the Act. ___ So. 2d at ___. Neither statement, however, speaks to the "nature of the material or workmanship" or "promises that such material or workmanship is defect free or [that it] will meet a specified level of performance over a specified period of time," as is required by 15 U.S.C. § 2301(6)(A) for it to constitute a "written warranty." See *Simmons v. Taylor*

Childre Chevrolet-Pontiac, Inc., 629 F. Supp. 1030, 1032 (M.D. Ga. 1986) (holding that the description of an automobile as "new" on the dealer's invoice was not a "written warranty" under the Act because, among other things, it did not promise a specified level of performance relating to a specified period of time); see also *Marine Midland Bank v. Carroll*, 98 A.D.2d 516, 519, 417 N.Y.S.2d 409, 411 (1984) (holding that the "Dealer's Pre-Delivery Inspection Requirements" form was a "written warranty" under § 2301(6)(A) because it did "represent[ ] that the motor home had been inspected and tested and was found to 'perform, function, operate and/or serve exactly as intended' "); *Freeman v. HUBCO Leasing Inc.*, 253 Ga. 698, 702, 324 S.E.2d 462, 467 (1985) (holding that the warranty, which stated, among other things, that it covered "defects in materials or workmanship caused in the manufacture or assembly of any part of the vehicle" constituted a "written warranty" under § 2301).

Because the Certificates of Quality Assurance do not constitute "written warranties," as that term is defined in the Magnuson-Moss Warranty Act, Horton Homes' disclaimer was sufficient to preclude Brooks's breach-of-implied-warranty claim. Therefore, I would hold that the trial court erred in submitting Brooks's breach-of-implied-warranty claim to the jury.

I, therefore, respectfully dissent.

APPENDIX C

15 U.S.C.A. § 2301

§ 2301. Definitions

For the purposes of this chapter:

(1) The term "consumer product" means any tangible personal property which is distributed in commerce and which is normally used for personal, family, or household purposes (including any such property intended to be attached to or installed in any real property without regard to whether it is so attached or installed).

(2) The term "Commission" means the Federal Trade Commission.

(3) The term "consumer" means a buyer (other than for purposes of resale) of any consumer product, any person to whom such product is transferred during the duration of an implied or written warranty (or service contract) applicable to the product, and any other person who is entitled by the terms of such warranty (or service contract) or under applicable State law to enforce against the warrantor (or service contractor) the obligations of the warranty (or service contract).

(4) The term "supplier" means any person engaged in the business of making a consumer product directly or indirectly available to consumers.

(5) The term "warrantor" means any supplier or other person who gives or offers to give a written warranty or who is or may be obligated under an implied warranty.

(6) The term "written warranty" means –

(A) any written affirmation of fact or written promise made in connection with the sale of a consumer product by a supplier to a buyer which relates to the nature of the material or workmanship and affirms or promises that such material or workmanship is defect free or will meet a specified level of performance over a specified period of time, or

(B) any undertaking in writing in connection with the sale by a supplier of a consumer product to refund, repair, replace, or take other remedial action with respect to such product in the event that such product fails to meet the specifications set forth in the undertaking, which written affirmation, promise, or undertaking becomes part of the basis of the bargain between a supplier and a buyer for purposes other than resale of such product.

(7) The term "implied warranty" means an implied warranty arising under State law (as modified by sections 2308 and 2304(a) of this title) in connection with the sale by a supplier of a consumer product.

(8) The term "service contract" means a contract in writing to perform, over a fixed period of time or for a specified duration, services relating to the maintenance or repair (or both) of a consumer product.

(9) The term "reasonable and necessary maintenance" consists of those operations (A) which the consumer reasonably can be expected to perform or have performed and (B) which are necessary to keep any consumer product performing its intended function and operating at a reasonable level of performance.

(10) The term "remedy" means whichever of the following actions the warrantor elects:

(A) repair,

(B) replacement, or

(C) refund;

except that the warrantor may not elect refund unless (i) the warrantor is unable to provide replacement and repair is not commercially practicable or cannot be timely made, or (ii) the consumer is willing to accept such refund.

(11) The term "replacement" means furnishing a new consumer product which is identical or reasonably equivalent to the warranted consumer product.

(12) The term "refund" means refunding the actual purchase price (less reasonable depreciation based on actual use where permitted by rules of the Commission).

(13) The term "distributed in commerce" means sold in commerce, introduced or delivered for introduction into commerce, or held for sale or distribution after introduction into commerce.

(14) The term "commerce" means trade, traffic, commerce, or transportation –

(A) between a place in a State and any place outside thereof, or

(B) which affects trade, traffic, commerce, or transportation described in subparagraph (A).

(15) The term "State" means a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin

Islands, Guam, the Canal Zone, or American Samoa. The term "State law" includes a law of the United States applicable only to the District of Columbia or only to a territory or possession of the United States; and the term "Federal law" excludes any State law.

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15 U.S.C.A. § 2303

§ 2303. Designation of written warranties

(a) Full (statement of duration) or limited warranty

Any warrantor warranting a consumer product by means of a written warranty shall clearly and conspicuously designate such warranty in the following manner, unless exempted from doing so by the Commission pursuant to subsection (c) of this section:

(1) If the written warranty meets the Federal minimum standards for warranty set forth in section 2304 of this title, then it shall be conspicuously designated a "full (statement of duration) warranty".

(2) If the written warranty does not meet the Federal minimum standards for warranty set forth in section 2304 of this title, then it shall be conspicuously designated a "limited warranty".

(b) Applicability of requirements, standards, etc., to representations or statements of customer satisfaction

This section and sections 2302 and 2304 of this title shall not apply to statements or representations which are

similar to expressions of general policy concerning customer satisfaction and which are not subject to any specific limitations.

(c) Exemptions by Commission

In addition to exercising the authority pertaining to disclosure granted in section 2302 of this title, the Commission may by rule determine when a written warranty does not have to be designated either "full (statement of duration)" or "limited" in accordance with this section.

(d) Applicability to consumer products costing more than $10 and not designated as full warranties

The provisions of subsections (a) and (c) of this section apply only to warranties which pertain to consumer products actually costing the consumer more than $10 and which are not designated "full (statement of duration) warranties".

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15 U.S.C.A. § 2308

§ 2308. Implied warranties

(a) Restrictions on disclaimers or modifications

No supplier may disclaim or modify (except as provided in subsection (b) of this section) any implied warranty to a consumer with respect to such consumer product if (1) such supplier makes any written warranty to the consumer with respect to such consumer product, or (2) at the time of sale, or within 90 days thereafter,

such supplier enters into a service contract with the consumer which applies to such consumer product.

(b) Limitation on duration

For purposes of this chapter (other than section 2304(a)(2) of this title), implied warranties may be limited in duration to the duration of a written warranty of reasonable duration, if such limitation is conscionable and is set forth in clear and unmistakable language and prominently displayed on the face of the warranty.

(c) Effectiveness of disclaimers, modifications, or limitations

A disclaimer, modification, or limitation made in violation of this section shall be ineffective for purposes of this chapter and State law.

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15 U.S.C.A. § 2310

§ 2310. Remedies in consumer disputes

(a) Informal dispute settlement procedures; establishment; rules setting forth minimum requirements; effect of compliance by warrantor; review of informal procedures or implementation by Commission; application to existing informal procedures

(1) Congress hereby declares it to be its policy to encourage warrantors to establish procedures whereby consumer disputes are fairly and expeditiously settled through informal dispute settlement mechanisms.

(2) The Commission shall prescribe rules setting forth minimum requirements for any informal dispute settlement procedure which is incorporated into the terms of a written warranty to which any provision of this chapter applies. Such rules shall provide for participation in such procedure by independent or governmental entities.

(3) One or more warrantors may establish an informal dispute settlement procedure which meets the requirements of the Commission's rules under paragraph (2). If –

(A) a warrantor establishes such a procedure,

(B) such procedure, and its implementation, meets the requirements of such rules, and

(C) he incorporates in a written warranty a requirement that the consumer resort to such procedure before pursuing any legal remedy under this section respecting such warranty, then (i) the consumer may not commence a civil action (other than a class action) under subsection (d) of this section unless he initially resorts to such procedure; and (ii) a class of consumers may not proceed in a class action under subsection (d) of this section except to the extent the court determines necessary to establish the representative capacity of the named plaintiffs, unless the named plaintiffs (upon notifying the defendant that they are named plaintiffs in a class action with respect to a warranty obligation) initially resort to such procedure. In the case of such a class action which is brought in a district court of the United States, the representative capacity of the named plaintiffs shall be established in the application of rule 23 of the Federal Rules of Civil Procedure. In any civil action arising out of a warranty

obligation and relating to a matter considered in such a procedure, any decision in such procedure shall be admissible in evidence.

(4) The Commission on its own initiative may, or upon written complaint filed by any interested person shall, review the bona fide operation of any dispute settlement procedure resort to which is stated in a written warranty to be a prerequisite to pursuing a legal remedy under this section. If the Commission finds that such procedure or its implementation fails to comply with the requirements of the rules under paragraph (2), the Commission may take appropriate remedial action under any authority it may have under this chapter or any other provision of law.

(5) Until rules under paragraph (2) take effect, this subsection shall not affect the validity of any informal dispute settlement procedure respecting consumer warranties, but in any action under subsection (d) of this section, the court may invalidate any such procedure if it finds that such procedure is unfair.

(b) Prohibited acts

It shall be a violation of section 45(a)(1) of this title for any person to fail to comply with any requirement imposed on such person by this chapter (or a rule thereunder) or to violate any prohibition contained in this chapter (or a rule thereunder).

(c) Injunction proceedings by Attorney General or Commission for deceptive warranty, noncompliance with requirements, or violating prohibitions; procedures; definitions

(1) The district courts of the United States shall have jurisdiction of any action brought by the Attorney General (in his capacity as such), or by the Commission by any of its attorneys designated by it for such purpose, to restrain (A) any warrantor from making a deceptive warranty with respect to a consumer product, or (B) any person from failing to comply with any requirement imposed on such person by or pursuant to this chapter or from violating any prohibition contained in this chapter. Upon proper showing that, weighing the equities and considering the Commission's or Attorney General's likelihood of ultimate success, such action would be in the public interest and after notice to the defendant, a temporary restraining order or preliminary injunction may be granted without bond. In the case of an action brought by the Commission, if a complaint under section 45 of this title is not filed within such period (not exceeding 10 days) as may be specified by the court after the issuance of the temporary restraining order or preliminary injunction, the order or injunction shall be dissolved by the court and be of no further force and effect. Any suit shall be brought in the district in which such person resides or transacts business. Whenever it appears to the court that the ends of justice require that other persons should be parties in the action, the court may cause them to be summoned whether or not they reside in the district in which the court is held, and to that end process may be served in any district.

(2) For the purposes of this subsection, the term "deceptive warranty" means (A) a written warranty which (i) contains an affirmation, promise, description, or representation which is either false or fraudulent, or

which, in light of all of the circumstances, would mislead a reasonable individual exercising due care; or (ii) fails to contain information which is necessary in light of all of the circumstances, to make the warranty not misleading to a reasonable individual exercising due care; or (B) a written warranty created by the use of such terms as "guaranty" or "warranty", if the terms and conditions of such warranty so limit its scope and application as to deceive a reasonable individual.

(d) Civil action by consumer for damages, etc.; jurisdiction; recovery of costs and expenses; cognizable claims

(1) Subject to subsections (a)(3) and (e) of this section, a consumer who is damaged by the failure of a supplier, warrantor, or service contractor to comply with any obligation under this chapter, or under a written warranty, implied warranty, or service contract, may bring suit for damages and other legal and equitable relief –

(A) in any court of competent jurisdiction in any State or the District of Columbia; or

(B) in an appropriate district court of the United States, subject to paragraph (3) of this subsection.

(2) If a consumer finally prevails in any action brought under paragraph (1) of this subsection, he may be allowed by the court to recover as part of the judgment a sum equal to the aggregate amount of cost and expenses (including attorneys' fees based on actual time expended) determined by the court to have been reasonably incurred by the plaintiff for or in connection with the commencement and prosecution of such action,

unless the court in its discretion shall determine that such an award of attorneys' fees would be inappropriate.

(3) No claim shall be cognizable in a suit brought under paragraph (1)(B) of this subsection –

(A) if the amount in controversy of any individual claim is less than the sum or value of $25;

(B) if the amount in controversy is less than the sum or value of $50,000 (exclusive of interests and costs) computed on the basis of all claims to be determined in this suit; or

(C) if the action is brought as a class action, and the number of named plaintiffs is less than one hundred.

(e) Class actions; conditions; procedures applicable

No action (other than a class action or an action respecting a warranty to which subsection (a)(3) of this section applies) may be brought under subsection (d) of this section for failure to comply with any obligation under any written or implied warranty or service contract, and a class of consumers may not proceed in a class action under such subsection with respect to such a failure except to the extent the court determines necessary to establish the representative capacity of the named plaintiffs, unless the person obligated under the warranty or service contract is afforded a reasonable opportunity to cure such failure to comply. In the case of such a class action (other than a class action respecting a warranty to which subsection (a)(3) of this section applies) brought under subsection (d) of this section for breach of any written or implied warranty or service contract, such reasonable opportunity will be afforded by the named

plaintiffs and they shall at that time notify the defendant that they are acting on behalf of the class. In the case of such a class action which is brought in a district court of the United States, the representative capacity of the named plaintiffs shall be established in the application of rule 23 of the Federal Rules of Civil Procedure.

(f) Warrantors subject to enforcement of remedies

For purposes of this section, only the warrantor actually making a written affirmation of fact, promise, or undertaking shall be deemed to have created a written warranty, and any rights arising thereunder may be enforced under this section only against such warrantor and no other person.

APPENDIX D

IN THE CIRCUIT COURT OF ELMORE COUNTY

SCOTT BROOKS,
PLAINTIFF

v.

SOUTHERN MANUFACTURED HOMES, INC., AND HORTON HOMES, INC.,
DEFENDANTS **CIVIL ACTION NO. CV 98-238**

COMPLAINT

(Filed Jul. 14, 1998)

1. The plaintiff is an individual residing at 837 Persons Road, Wetumpka, Alabama.

2. Southern manufactured Homes, Inc., and Horton Homes, Inc. (hereinafter jointly referred to as the manufacturer) are corporations engaged in the business of manufacturing mobile homes. The address of Southern is Post Office Drawer 4468 Eatonton, GA 31024, and the address of Horton is P.O. Box 4410 Eatonton, Georgia 31024.

COUNT I: BREACH OF EXPRESS WARRANTY

3. On or about September 9, 1997, the plaintiff purchased from Factory Direct Homes, Inc. a manufactured home, serial numbers H812092GL and H8102092GR. The home was manufactured by Southern Manufactured Homes, Inc., and Horton Homes, Inc.

4. The plaintiff purchased the home for his personal, family, or household use.

5. The manufacturer expressly warranted to the plaintiff by written warranty that it would remedy defects in materials or workmanship in the home for one year.

6. The home contained substantial manufacturing defects, including but not limited to defects in the flooring, plumbing, electrical systems, walls, cabinets, ceilings, and texturing of the ceiling.

7. The plaintiff gave the manufacturer notice of this breach of warranty. The manufacturer failed or refused to repair some of the defects, and it failed to repair other defects for an extended period of time, causing portions of the plaintiff's home to become saturated with water and causing the plaintiff to suffer mental anguish, worry, and distress.

8. As a proximate consequence of the manufacturer's breach of warranty, the plaintiff has suffered annoyance, inconvenience, mental anguish, and the value of the home is less than it would have been if the home had been as warranted and if the manufacturer had performed according to its warranty.

COUNT II: BREACH OF IMPLIED WARRANTY

9. In or about August 1997 the plaintiff ordered from Southern Manufactured Homes, Inc., and Horton Homes, Inc. a mobile home, the home to contain certain features selected by the plaintiff. Southern Manufactured Homes, Inc., and Horton Homes, Inc. constructed the

home specifically for the plaintiff, and or on about September 9, 1997, the plaintiff received delivery of the home from Factory Direct Homes, Inc.

10. The plaintiff purchased the above home for his personal, family, or household use.

11. Pursuant to section 7-2-314 of the Alabama Code and section 2308(a) of title fifteen of the United States Code, Southern Manufactured Homes, Inc., and Horton Homes, Inc. impliedly warranted to the plaintiff that the home was merchantable, that it was habitable, that it was free from substantial defects, and that it would meet the ordinary expectations of a consumer concerning a new product.

12. The home contained substantial manufacturing defects, including but not limited to defects in the flooring, plumbing, electrical systems, walls, cabinets, ceilings, and texturing of the ceiling.

13. The plaintiff gave the manufacturer notice of this breach of warranty. The manufacturer failed or refused to repair some of the defects, and it failed to repair other defects for an extended period of time, causing portions of the plaintiff's home to become saturated with water and causing the plaintiff to suffer mental anguish, worry, and distress.

14. As a proximate consequence of the manufacturer's breach of warranty, the plaintiff has suffered annoyance, inconvenience, mental anguish, and the value of the home is less than it would have been if the home had been as warranted and if the manufacturer had performed according to its warranty.

COUNT III: VIOLATION OF MAGNUSON MOSS ACT

15. The plaintiff incorporates herein the allegations of count I (breach of express warranty) and count II (breach of implied warranty).

16. The failure of the manufacturer to repair the home, and perform under its warranty, violated the Magnuson Moss Warranty Act.

COUNT IV: NEGLIGENT CONSTRUCTION

17. In or about August 1997 the plaintiff ordered from Southern Manufactured Homes, Inc., and Horton Homes, Inc. a mobile home, the home to contain certain features selected by the plaintiff. Southern Manufactured Homes, Inc., and Horton Homes, Inc. constructed the home specifically for the plaintiff, and on or about September 9, 1997, the plaintiff received delivery of the home from Factory Direct Homes, Inc.

18. The manufacturer negligently constructed the home.

19. As a proximate consequence of the negligence of the manufacturer, the plaintiff has suffered annoyance, inconvenience, mental anguish, and the value of the home is less than it would have been if properly constructed.

COUNT V: WANTON CONSTRUCTION

20. In or about August 1997 the plaintiff ordered from Southern Manufactured Homes, Inc., and Horton

Homes, Inc. a mobile home, the home to contain certain features selected by the plaintiff. Southern Manufactured Homes, Inc., and Horton Homes, Inc. constructed the home specifically for the plaintiff, and or on about September 9, 1997, the plaintiff received delivery of the home from Factory Direct Homes, Inc.

21. The manufacturer wantonly constructed the home.

22. Southern Manufactured Homes, Inc., and Horton Homes, Inc. consciously and deliberately engaged in oppression, fraud, wantonness, or malice with regard to the plaintiff.

23. With respect to any conduct herein for which a principal or employer is to be held liable for the wrongful conduct of an agent, servant, or employee, the plaintiff alleges that the principal knew or should have known of the unfitness of the agent, servant, or employee, and employed him or continued to employ him or used his services without proper instruction or with a disregard of the rights or safety of others; or authorized the wrongful conduct; or ratified the wrongful conduct; or the act of the agent, servant, or employee was calculated to or did benefit the principal or employer.

24. As a proximate consequence of the wantonness of the manufacturer, the plaintiff has suffered annoyance, inconvenience, mental anguish, and the value of the home is less than it would have been if properly constructed.

COUNT VI: NEGLIGENT REPAIR

25. Southern Manufactured Homes, Inc., and Horton Homes, Inc. undertook to repair certain defects in the plaintiff's home.

26. Southern Manufactured Homes, Inc., and Horton Homes, Inc. negligently performed their undertaking and damaged the home, including but not limited to the kitchen, the kitchen cabinets, the kitchen flooring and floor covering, the kitchen and laundry walls, the stove gas line, and the dishwasher. The defendants left the plaintiff's freezer outside and other appliances disconnected and in improper locations, and they further left construction debris in plaintiff's yard.

27. As a proximate consequence of the manufacturer's negligent repair, the plaintiff has suffered annoyance, inconvenience, mental anguish, and the value of the home is less than it would have been if properly repaired.

COUNT VII: WANTON REPAIR

28. Southern Manufactured Homes, Inc., and Horton Homes, Inc. undertook to repair certain defects in the plaintiff's home.

29. Southern Manufactured Homes, Inc., and Horton Homes, Inc. wantonly performed their undertaking and damaged the home, including but not limited to the kitchen, the kitchen cabinets, the kitchen flooring and floor covering, the kitchen and laundry walls, the stove gas line, and the dishwasher. The defendants left the

plaintiff's freezer outside and other appliances disconnected and in improper locations, and they further left construction debris in plaintiff's yard.

30. Southern Manufactured Homes, Inc., and Horton Homes, Inc. consciously and deliberately engaged in oppression, fraud, wantonness, or malice with regard to the plaintiff.

31. With respect to any conduct herein for which a principal or employer is to be held liable for the wrongful conduct of an agent, servant, or employee, the plaintiff alleges that the principal knew or should have known of the unfitness of the agent, servant, or employee, and employed him or continued to employ him or used his services without proper instruction or with a disregard of the rights or safety of others; or authorized the wrongful conduct; or ratified the wrongful conduct; or the act of the agent, servant, or employee was calculated to or did benefit the principal or employer.

32. As a proximate consequence of the wantonness of the manufacturer, the plaintiff has suffered annoyance, inconvenience, mental anguish, and the value of the home is less than it would have been if properly constructed.

COUNT VIII: FRAUDULENT CONCEALMENT

33. In or about August 1997 the plaintiff ordered from Southern Manufactured Homes, Inc., and Horton Homes, Inc. a mobile home, the home to contain certain features selected by the plaintiff. Southern Manufactured Homes, Inc., and Horton Homes, Inc. constructed the

home specifically for the plaintiff, and on or about September 9, 1997, the plaintiff received delivery of the home from Factory Direct Homes, Inc.

34. Southern Manufactured Homes, Inc., and Horton Homes, Inc. innocently, negligently, wantonly or intentionally withheld, concealed, or suppressed from the plaintiff certain material facts that it was under a duty to communicate to the plaintiff based upon a confidential relationship between the parties or the particular facts of the case; namely, that the home contained certain existing violations of regulations of the Department of Housing and Urban Development and that the sale of the home with such violations was prohibited by law.

35. In reasonable reliance on Southern Manufactured Homes, Inc., and Horton Homes, Inc., the plaintiff accepted delivery of the home.

36. Southern Manufactured Homes, Inc., and Horton Homes, Inc. consciously and deliberately engaged in oppression, fraud, wantonness, or malice with regard to the plaintiff.

37. With respect to any conduct herein for which a principal or employer is to be held liable for the wrongful conduct of an agent, servant, or employee, the plaintiff alleges that the principal knew or should have known of the unfitness of the agent, servant, or employee, and employed him or continued to employ him or used his services without proper instruction or with a disregard of the rights or safety of others; or authorized the wrongful conduct; or ratified the wrongful conduct; or the act of the agent, servant, or employee was calculated to or did benefit the principal or employer.

38. As a proximate consequence of the manufacturer's failure to disclose, the plaintiff has suffered annoyance, inconvenience, mental anguish, and the value of the home is less than it would have been if properly constructed.

COUNT IX: MISREPRESENTATION

39. In or about August 1997 the plaintiff ordered from Southern Manufactured Homes, Inc., and Horton Homes, Inc. a mobile home, the home to contain certain features selected by the plaintiff.

40. To induce the plaintiff to accept delivery of the home, the manufacturer represented the following material facts to the plaintiff:

a) that the home had been carefully inspected to ensure quality and cleanliness;

b) that certain named persons had inspected the home;

c) that the home contained the features ordered by the plaintiff.

41. The representation were false, and the manufacturer knew that they were false; alternatively, the plaintiff alleges that the manufacturer made the representations wantonly, recklessly without knowledge of the true facts, or by mistake.

42. The plaintiff believed the representations, and in reasonable reliance thereon, he accept delivery of the home.

43. The manufacturer consciously and deliberately engaged in oppression, fraud, wantonness, or malice with regard to the plaintiff.

44. With respect to any conduct herein for which a principal or employer is to be held liable for the wrongful conduct of an agent, servant, or employee, the plaintiff alleges that the principal knew or should have known of the unfitness of the agent, servant, or employee, and employed him or continued to employ him or used his services without proper instruction or with a disregard of the rights or safety of others; or authorized the wrongful conduct; or ratified the wrongful conduct; or the act of the agent, servant, or employee was calculated to or did benefit the principal or employer.

45. As a proximate consequence of the manufacturer's misrepresentations, the plaintiff has suffered annoyance, inconvenience, and mental anguish, and the value of the home is less than it otherwise would have been.

WHEREFORE, the plaintiff demands judgment against Southern Manufactured Homes, Inc., and Horton Homes, Inc. for such sum of compensatory and punitive damages as a jury may assess, in excess of $10,000, all together with interest, costs, and attorneys fees under the Magnuson Moss Warranty Act.

HOWARD, DUNN, HOWARD & HOWARD,
Attorneys for Plaintiff

BY /s/ G. Houston Howard
G. Houston Howard II (H0WO15)

ATTORNEYS FOR PLAINTIFF:

G. Houston Howard II
HOWARD, DUNN, HOWARD & HOWARD
102 SOUTH BOUNDARY STREET
WETUMPKA, AL 36092
(334) 567-4356

PLAINTIFF DEMANDS A TRIAL BY JURY

/s/ G. Houston Howard

PLAINTIFF REQUESTS SERVICE ON DEFENDANTS BY CERTIFIED MAIL.

/s/ G. Houston Howard

IN THE CIRCUIT COURT OF
ELMORE COUNTY, ALABAMA

SCOTT BROOKS, (Filed Feb. ___, 1999)

PLAINTIFF

v.

CASE NO.
CV-98-238-F

SOUTHERN MANUFACTURED HOMES, INC., AND HORTON HOMES, INC.; GEORGE MORGAN; and FICTITIOUS PARTY A. Whether singular or plural, being that entity or those entities which transported, set up, or delivered the home referred to herein.

DEFENDANTS

AMENDMENT TO COMPLAINT

Comes now the plaintiff and amends the Complaint by adding as a defendant George Morgan and Fictitious Party A and alleges as follows:

COUNT X: NEGLIGENT TRANSPORTATION, DELIVERY, AND SETUP

46. On or about September 9, 1997, the plaintiff purchased from Factory Direct Homes, Inc a manufactured home constructed by Southern Manufactured Homes, Inc. and/or Horton Homes, Inc.

47. The defendant George Morgan and Fictitious Party A undertook to transport, deliver and setup the home.

48. These defendants negligently performed their undertaking and damaged the home.

49. As a proximate consequence of the negligence of Morgan and Fictitious Party A, the plaintiff has suffered annoyance, inconvenience, mental anguish, and the value of the home is less than it otherwise would have been.

COUNT XI: WANTON TRANSPORTATION, DELIVERY, AND SETUP

50. On or about September 9, 1997, the plaintiff purchased from Factory Direct Homes, Inc a manufactured home constructed by Southern Manufactured Homes, Inc. and/or Horton Homes, Inc.

51. The defendant George Morgan and Fictitious Part A undertook to transport, deliver and setup the home.

52. These defendants wantonly performed their undertaking and damaged the home.

53. The defendant consciously and deliberately engaged in oppression, fraud, wantonness, or malice with regard to the plaintiffs.

54. With respect to any conduct herein for which a principal or employer is to be held liable for the wrongful conduct of an agent, servant or employee, the plaintiffs allege that the principal knew or should have know [sic] of the unfitness of the agent, servant, or employee, and employed him or continued to employ him or continued to use his services without proper instruction or with a disregard of the rights or safety of other; or authorized the wrongful conduct; or ratified the wrongful conduct;

or the act of the agent, servant, or employee was calculated to or did benefit the principal or employer.

55. As a proximate consequence of the wantonness of Morgan and Fictitious Party A, the plaintiff has suffered annoyance, inconvenience, mental anguish, and the value of the home is less than it otherwise would have been.

COUNT XII: FAILURE TO DISCLOSE

56. In or about September 1997 the defendant Morgan and Fictitious Party A undertook to transport deliver, and setup the plaintiff's mobile home.

57. In the process of such work, these defendants damaged the home or discovered certain existing damage to the home.

58. The defendants Morgan and Fictitious Party A innocently, negligently, wantonly, or intentionally withheld, concealed, and suppressed from the plaintiff the fact that the home had been damaged or that they had damaged the same.

59. In reasonable reliance on these defendants, the plaintiffs accepted delivery of the home.

60. The defendants consciously and deliberately engaged in oppression, fraud, wantonness, or malice with regard to the plaintiff.

61. With respect to any conduct herein for which a principal or employer is to be held liable for the wrongful conduct of an agent, servant or employee, the plaintiff alleges that the principal knew or should have know [sic]

of the unfitness of the agent, servant, or employee, and employed him or continued to employ him or continued to use his services without proper instruction or with a disregard of the rights or safety of others; or authorized the wrongful conduct; or ratified the wrongful conduct; or the act of the agent, servant, or employee was calculated to or did benefit the principal or employer.

62. As a proximate consequence of these defendants' failure to disclose, the plaintiff has suffered annoyance, inconvenience, and mental anguish, and the value of the home is less than it otherwise would have been.

WHEREFORE, the plaintiff demands judgment against George Morgan and Fictitious Party A for such compensatory and punitive damages in excess of $10,000 as a jury may award, together with interest and costs.

HOWARD, DUNN, HOWARD & HOWARD
Attorneys for Plaintiff

By /s/ G. Houston Howard II

OF CONSEL:
G. HOUSTON HOWARD II (HOW 015)
HOWARD, DUNN, HOWARD & HOWARD
P.O. Box 1148
Wetumpka, Alabama 36092
(334) 567-4356

PLAINTIFF HEREBY DEMANDS A TRIAL BY JURY

/s/ G. Houston Howard II

Plaintiff Requests Service on the Defendant George Morgan by Certified Mail at 1932 Midway Street, Montgomery, Alabama 36110.

CERTIFICATE OF SERVICE

I, the undersigned, of counsel in the above styled cause, do hereby certify that I have served a copy of the foregoing document or pleading on Martin L. Fierman, at P.O. Box 3730, Eatonton, Georgia, 31024 and Will O. (Tripp) Walton, III, at P.O. Box 2069, Opelika, Alabama 36803-2069, by depositing a copy thereof in a United States mail receptacle, addressed to the last known mailing address of such counsel, first class mail, postage prepaid, this the 1 day of February, 1999.

/s/ G. Houston Howard II
OF COUNSEL (HOW015)

IN THE CIRCUIT COURT
OF ELMORE COUNTY, ALABAMA

SCOTT BROOKS,

PLAINTIFF

v.

SOUTHERN MANUFACTURED HOMES, INC., AND HORTON HOMES, INC.; GEORGE MORGAN; and FICTITICIOUS PARTY A, Whether singular or plural, being that entity or those entities which transported, set up, or delivered the home referred to herein.

DEFENDANTS

(Filed Apr. 11, 2000)

CASE NO.
CV-98-238-F

AMENDMENT TO COMPLAINT

Comes now the plaintiff and amends the Complaint by adding the following thereto:

COUNT XIII: MISLEADING WARRANTY UNDER MAGNUSON MOSS ACT

63. On or about September 9, 1997, the plaintiff purchased from Factory Direct Homes, Inc. a manufactured home, as previously described in the Complaint.

64. The plaintiff purchased the home for his personal, family, or household use.

65. The defendants Southern Manufactured Homes and Horton Homes, Inc. provided the written warranty

attached hereto as exhibit A. At the time the home was delivered to the plaintiff, the home contained defects in materials and workmanship, including defects in installation and damage caused by delivery and installation.

66. The defendants' warranty does not expressly exclude liability for such defects or damage, and to the extent that the defendants contend that such defects or damage are not covered by the warranty, then such warranty is misleading and violates section 2302 of title 15 of the United States Code, together with the regulations adopted under it.

67. As a proximate consequence of the defendants' misleading warranty, the plaintiff has suffered mental anguish, worry, and distress; his home has not been repaired; and the value of his home is less than it otherwise would have been.

COUNT XIV: BREACH OF WARRANTY

68. On or about September 9, 1997, the plaintiff purchased from Factory Direct Homes, Inc. the manufactured home described previously in the Complaint.

69. The defendants Southern Manufactured Homes, Inc. and Horton Homes, Inc. provided a Home Owner's Manual, and such manual contained the statement of "dealer's obligations" as reflected by exhibit B.

70. Such statement constituted a warranty by the defendant that the dealer would properly deliver and install the home, and that such dealer would be available to correct defects in materials or workmanship or damage caused in delivery and setup.

71. The plaintiff's home suffered damage in delivery and setup, which has not been repaired.

72. The dealer, Factory Direct Homes, Inc. is non-operational and is out of business.

73. As a proximate consequence of the defendants' breach of warranty, the plaintiff has suffered mental anguish, worry, distress, and the value of the home is less than it otherwise would have been.

XV: VIOLATION OF THE MAGNUSON MOSS ACT

74. The plaintiff incorporates herein the allegations of the last count.

75. The defendants' conduct described herein constitutes a violation of the Magnuson Moss Warranty Act.

WHEREFORE, the plaintiff demands judgment against the defendants for such compensatory and punitive damages in excess of $10,000 as a jury may award, together with attorney fees and costs under the Magnuson Moss Act.

HOWARD, DUNN, HOWARD & HOWARD
Attorneys for Plaintiff

BY /s/ G. Houston Howard II

PLAINTIFF HEREBY DEMANDS A TRIAL BY JURY

/s/ G. Houston Howard II

OF COUNSEL:
G. HOUSTON HOWARD II (HOW 015)
HOWARD, DUNN, HOWARD & HOWARD
P.O. Box 1148
Wetumpka, Alabama 36092
(334) 567-4356

CERTIFICATE OF SERVICE

I, the undersigned, of counsel in the above styled cause, do hereby certify that I have served a copy of the foregoing document or pleading on Martin L. Fierman, at P.O. Box 3730, Eatonton, Georgia, 31024 and Matthew White, at P.O. Box 2069, Opelika, Alabama 36803-2069, by depositing a copy thereof in a United States mail receptacle, addressed to the last known mailing address of such counsel, first class mail, postage prepaid, this the 11 day of April, 2000.

/s/ G. Houston Howard II
OF COUNSEL (HOW015)

EXHIBIT A

LIMITED ONE-YEAR WARRANTY

Horton Homes, Inc, warrants to the original retail purchaser, the original dealer and any subsequent owner of each new manufactured home by Horton Homes, that each part of the manufactured home shall be free under normal use and service from defects in material and workmanship for a period of one (1) year after the initial delivery of the manufactured home to the original retail purchaser.

The foregoing warranty shall not apply to (1) parts or equipment covered by an individual warranty or their respective manufacturer or (2) any manufactured home

which has been repaired or altered by unauthorized persons in any way that affects its reliability or which has been subject to misuse, negligence, or accident.

The obligation of Horton Homes, Inc. under the foregoing warranty shall be limited to making good within a reasonable time, not to exceed sixty (60) days, at their factory any part or parts of the manufactured home which shall be returned to them within one (1) year, or to making good at the site of the home any part or parts of the manufactured home which are found to be defective in materials or workmanship and which defect is reported to Horton Homes, Inc. within one (1) year after delivery of the manufactured home to the original retail purchaser. The replacement of any part or parts of the manufactured home and the labor involved in such replacement shall be done at no additional expense to the purchaser.

In order to obtain performance of any obligations under the foregoing warranty the purchaser shall (1) ascertain and follow all instructions in the Owner's Manual relating to care and maintenance of the manufactured home. (2) Promptly report any defects in materials or workmanship to the dealer from whom the manufactured home was purchased, or to the service department of Horton Homes, Inc. at its factory in Eatonton, Georgia (706) 485-8506.

This warranty gives you specific legal rights and you may also have other legal rights which vary from state to state. Horton Homes, Inc. makes the foregoing warranty expressly IN LIEU OF ANY OTHER EXPRESS OR IMPLIED WARRANTY, INCLUDING ANY IMPLIED

WARRANTY OF MERCHANTABILITY OR FITNESS, WHICH IMPLIED WARRANTIES ARE HEREBY EXPRESSLY EXCLUDED, and expressly in lieu of any other obligation on the part of the manufacturer.

Horton Homes, Inc. has not authorized any DEALER or other person to make any representations or to assume any liability on behalf of Horton Homes, Inc.

EXHIBIT B

DEALER'S OBLIGATIONS

The dealer is responsible for arranging for delivery of the home to the retail purchaser's site, for installing (or arranging for the installation) of the home at the site, for inspecting the home before it is occupied by the owner and, if necessary, for making minor adjustments to the home. By agreement with the manufacturer, the dealer is obligated at no charge to the owner to repair or replace any parts necessary to correct defects in material or workmanship.

APPENDIX E

IN THE CIRCUIT COURT OF ELMORE COUNTY

SCOTT BROOKS,

Plaintiff

v.

SOUTHERN MANUFACTURED HOMES, INC. and HORTON HOMES, INC.,

Defendants.

CIVIL ACTION NO. CV98-238

ANSWER OF DEFENDANT HORTON HOMES, INC.

(Filed Aug. 19, 1998)

NOW COMES Horton Homes, Inc., a Defendant named above, and for its ANSWER shows the Court as follows:

1.

As to this Defendant, the allegations of Paragraphs 1, 2, 3, 4, 9, 10, 17, 20, 25, 28, 33 and 39 of Plaintiff's **COMPLAINT** are admitted.

2.

As to this Defendant, the allegations of Paragraphs 6, 8, 12, 14, 16, 18, 19, 21, 22, 23, 24, 26, 27, 29, 30, 31, 32, 34, 35, 36, 37, 41, 42, 43, 44, and 45 of Plaintiff's ***COMPLAINT*** are denied.

3.

As pled the allegations of Paragraph 5 of Plaintiff's ***COMPLAINT*** are denied, and this Defendant affirmatively states that it provided a written warranty, the terms of which will speak for themselves.

4.

In response to the allegation of Paragraphs 7 and 13 of Plaintiff's ***COMPLAINT***, the first sentence is admitted. The remaining allegations of said paragraphs are denied and Defendant affirmatively states that it responded timely to request for service from the Plaintiff and fulfilled its obligation pursuant to its warranty by accomplishing appropriate repairs.

5.

Defendant denies the allegations of Paragraph 11 of Plaintiff's ***COMPLAINT*** and states that it did, in fact, provide an express written warranty, the terms of which will speak for itself.

6.

The allegations of Paragraph 40 of Plaintiff's ***COMPLAINT*** are denied and Defendant affirmatively states that it made no representations to the Plaintiff whatsoever other than those set forth in the Homeowner's Manual provided with the home.

7.

Each and every allegation of Plaintiff's ***COMPLAINT*** not specifically admitted, is denied.

8.

And for further answer to Plaintiff's *COMPLAINT* filed in this cause, this Defendant states that the sole proximate cause of the injuries and/or damages, if any, complained of by the Plaintiff in Plaintiff's *COMPLAINT*, was the negligence of the Plaintiff and if said negligence was not the sole proximate cause, then it constituted a major contributing cause thereto.

9.

And for further answer to Plaintiff's *COMPLAINT* this Defendant states that the sole proximate cause of the injuries and/or damages, if any, complained of was the negligence of other persons, firms or corporations, for which it is not responsible as a matter of law, and if said negligence was not the sole proximate cause, then it constituted a major contributing cause thereto and should be apportioned.

10.

And for further answer to Plaintiff's *COMPLAINT* filed in this cause, the Defendant states that the Plaintiff has failed to give proper notice of the alleged defects pursuant to the Uniform Commercial Code, Magnuson-Moss Warranty Act, or any other applicable state or federal statutes.

11.

And for further answer to Plaintiff's *COMPLAINT*, this Defendant states that it delivered unto the Plaintiff an express written warranty and that this Defendant fully complied with the terms and conditions of the express written warranty and as a result thereof this Defendant

fully discharged its obligations under the terms and conditions of said express written warranty and this Defendant has no further liability to the Plaintiff as a result of the matters, facts and things alleged in Plaintiff's *COMPLAINT*.

12.

And for further answer to Plaintiff's *COMPLAINT*, this Defendant would show that the Plaintiff in this case is not entitled to rely upon any implied warranty in view of the express written warranty and even if the Plaintiff was entitled to rely upon any implied warranty, said warranty was not breached as said home was reasonably fit for its intended purpose and this Defendant at all times stood ready to correct any defects in the home in accordance with the terms and conditions of the express written warranty hereinabove mentioned.

13.

And for further answer to Plaintiff's *COMPLAINT*, this Defendant states that if the home is shown to contain a defect or malfunction, the Plaintiff did not allow this Defendant a reasonable number of attempts to remedy said defects.

14.

And for further answer to Plaintiff's *COMPLAINT*, this Defendant states that any alleged nonconformity does not impair the use, market value or safety of the home.

15.

And for further answer to Plaintiff's ***COMPLAINT***, this Defendant states that Plaintiff's ***COMPLAINT*** is not filed in good faith and that the Plaintiff has wholly refused and/or failed to avail himself of arbitration or the informal dispute settlement procedure as provided by the Magnuson-Moss Warranty Act and, therefore, the Plaintiff is not entitled to any remedies including attorney's fees for failure to submit to arbitration.

16.

And for further answer to Plaintiff's ***COMPLAINT***, this Defendant states that to the extent that any of the insurance policies or other documents arising out of the events made the basis of the ***COMPLAINT*** contain mandatory arbitration provisions, said claims are barred by the provisions of the Federal Arbitration Act, 9 U.S.C. Section 1, *et seq.*

17.

And for further answer to Plaintiff's ***COMPLAINT***, this Defendant states that any award of punitive damages against Horton Homes, Inc. would violate the constitutional safeguards provided to this Defendant under, separately and severally, Article I, Section 10[1] and/or the Fourth, Fifth, Sixth, Eighth and/or Fourteenth Amendments to the Constitution of the United States and provisions of the Constitution of the State of Alabama on the following separate and several grounds:

(a) That civil procedures pursuant to which punitive damages are awarded may result wrongfully in a

punishment by an award of punitive damages after the fact.

(b) That civil procedures pursuant to which punitive damages are awarded may result in the award of joint and several judgments against multiple defendants for different alleged acts of wrongdoing.

(c) That civil procedures pursuant to which punitive damages are awarded fail to provide means for awarding separate judgments against alleged joint tort feasors.

(d) That civil procedures pursuant to which punitive damages are awarded fail to provide a limit on the amount of the award against the Defendant.

(e) That civil procedures pursuant to which punitive damages are awarded fail to provide specific standards or guidelines upon which to base the amount of the award of punitive damages.

(f) That civil procedures pursuant to which punitive damages are awarded permit the award of punitive damages, penal in nature, upon satisfaction of a standard of proof less than that applicable to the imposition of criminal sanctions.

(g) That civil procedures pursuant to which punitive damages are awarded permit the award of punitive damages, penal in nature, which exceed the maximum fines which could be imposed for criminal conviction of the same offense.

(h) That civil procedures pursuant to which punitive damages may be awarded allow the imposition of punitive damages, which are penal in nature, against this Defendant without according this Defendant the same procedural safeguards accorded to criminal defendants.

(i) That civil procedures pursuant to which punitive damages are awarded permit different juries to award differing amounts of punitive damages for the same or similar alleged acts by different defendants.

(j) That civil procedures pursuant to which punitive damages are awarded fail to provide a clear, consistent appellate standard of review of an award of punitive damages and/or jury awards of punitive damages are cloaked with a presumption or correctness.

(k) That civil procedures pursuant to which punitive damages are awarded permit the admission of evidence relative to punitive damages in the same proceeding during which liability and compensatory damages are determined thereby prejudicing the Defendant and/or such evidence is not admissible in other proceedings.

(l) That standards of conduct upon which punitive damages are awarded are impermissibly vague and imprecise and/or the determination of punitive damages is standardless, is not based upon objective standards and is not related to any legitimate governmental interest.

(m) That civil procedures pursuant to which punitive damages are awarded may permit the imposition of excessive fines and penalties and/or punitive damages which exceed the maximum criminal fines for the same or similar conduct.

(n) That civil procedures pursuant to which punitive damages are awarded permit the award of punitive damages, which are penal in nature, upon satisfaction of a standard of proof which is no greater that [sic] the standard of proof for ordinary civil cases in which punitive damages are not awarded.

(o) That civil procedures pursuant to which punitive damages are awarded permit the imposition of arbitrary, capricious, or oppressive penalties.

(p) That civil procedures pursuant to which punitive damages are awarded fail to limit the discretion of the jury and the award of punitive damages.

(q) That civil procedures pursuant to which punitive damages are awarded, which are penal in nature, compel this Defendant to disclose potentially self-incriminating documents and evidence.

(r) That civil procedures pursuant to which punitive damages may be awarded against this Defendant would constitute an impermissible punishment of status.

(s) That civil procedures pursuant to which punitive damages may be awarded against this Defendant would punish this Defendant on a vicarious liability basis by allowing punitive damages to be awarded against it under the doctrine of respondeat superior.

(t) That civil procedures pursuant to which punitive damages may be awarded against this Defendant may impermissibly subject certain defendants to open-ended punitive damages while Alabama law limits the amount of such damages that may be awarded against other classes of defendants.

(u) The civil procedures pursuant to which punitive damages may be awarded fail to provide any procedure for the apportionment of damages between a principal and its agent.

(v) The manner in which punitive damages are assessed by separate juries in Alabama, violates the principal of separation of power and/or provides

no consistent or meaningful guidelines and/or is arbitrary and capricious.

(w) The civil procedures pursuant to which punitive damages may be awarded do not reasonably permit a defendant an opportunity to present evidence of the nonexistence of aggravating circumstances and/or in mitigation of damages.

(x) The civil procedures pursuant to which punitive damages assessed by juries are reviewed is insufficient, vague, without objective standards and arbitrary and offers no protection to defendants from irrationally disproportionate awards of punitive damages and affords no consistency between awards of punitive damages for the same or similar conduct in different cases.

(y) The civil procedures pursuant to which punitive damages may be awarded severely limit the ability of a defendant to present evidence concerning corrective action and/or actions taken to mitigate, reduce, or negate damages to a plaintiff.

(z) Despite appellate decisions which purport to prohibit a jury from considering the financial position of a defendant and the assessment of punitive damages, the civil procedures pursuant to which punitive damages may be awarded fail to reasonably restrict the introduction of such evidence and/or comments by Plaintiff's counsel which refer to and/or emphasize the wealth of a defendant.

(aa) The civil procedures pursuant to which punitive damages may be awarded do not reasonably prohibit the award of punitive damages against a principal for the intentionally wrongful conduct of its agent without proof of any intentional wrongful conduct by the principal.

(ab) The Defendant was not provided with fair notice that its conduct would subject it to punitive damages or of the severity of the punitive damages that may be imposed.

(ac) The civil procedures pursuant to which punitive damages may be awarded impermissibly allow the award of punitive damages for conduct occurring outside the State of Alabama.

18.

And for further answer to Plaintiff's ***COMPLAINT,*** this Defendant states that imposing punitive damages against Horton Homes, Inc. would constitute grossly excessive punishment in violation of Horton Homes, Inc.'s rights under the due process laws of the United States Constitution based upon the decision of the United States Supreme Court in ***BMW of North America, Inc. v. Gore*, 116 S.Ct. 1589 (1996).**

19.

And for further answer to Plaintiff's ***COMPLAINT,*** this Defendant states that the imposition of punitive damages in this case would be in denial of Horton Homes, Inc.'s right to equal protection of the laws as guaranteed by the Fourteenth Amendment of the United States Constitution and Alabama. Specifically, Horton Homes, Inc. is treated differently from defendants which are charged for similar or identical culpability. Alternatively, the absence of adequate and objective standards for guiding in the assessment of punitive damages fails to insure the equality of treatment between and among similarly situated civil defendants.

WHEREFORE, having fully responded, this Defendant, Horton Homes, Inc., prays that the relief sought by the Plaintiff be denied with costs cast upon the Plaintiff.

/s/ Martin L. Fierman
Martin L. Fierman
Attorney for Defendant
Horton Homes, Inc.

100 N. Madison Avenue
Post Office Box 3730
Eatonton, Georgia 31024
Tel. 706/485-4400

/s/ Will O. Walton III
Will O. (Trip) Walton, III
Attorney for Defendant
Horton Homes, Inc.

Post Office Box 2069
Opelika, Alabama 36803-2069
Tel. 334/745-6466

APPENDIX F

PLAINTIFF'S EXHIBIT 201

Certificate of Quality Assurance

Your new home has been carefully inspected to ensure quality and cleanliness.

/s/ John Laverats
PRODUCTION LINE MANAGER

/s/ Jim [Illegible]
FINAL FINISH SUPERVISOR

/s/ Goff
CLEANING CREW SUPERVISOR

/s/ Joan Catherine
CLEANING CREW MEMBER

/s/ Carol Becky
CLEANING CREW MEMBER

812092L
SN#

9-2-97
DATE

DYNASTY . . . *Built for a lifetime!*

APPENDIX G

EXHIBIT 22

BROOKS HOURS

6-23-98	2.20	Initial conference with Scott
7-13-98	3.5	Conference with Scott; prepare complaint and discovery
7-14-98	.75	Prepare complaint and discovery
7-27-98	2.5	Make photographs and video tape at brooks' home
9-6-98	.30	Letter to Chesser and Scott
9-16-98	.5	Review discovery; letter to client
9-21-98	.20	Telephone with client
12-13-98	2.5	Review file; work on interrogatory answers
12-14-98	1.5	Review file; work on interrogatory answers
12-28-98	.40	Telephone with Scott
1-3-98	3.5	Work on interrogatory answers and response to request for production
1-31-99	1.25	Review file; work on discovery
2-1-99	1	Meet with Scot; work on interrogatory answers
2-27-99	.60	Draft deposition notices; review file
2-26-99	.30	Schedule depositions; letter and telephone to Scott
3-1-99	.30	Telephone with Scott; prepare discovery

3-5-99	.20	Letter conveying document from Dynamic Mobile Homes
3-10-99	3.25	Conference with client and prepare for deposition
3-18-99	.30	Review documents produced by Greenpoint
3-20-99	.20	Call Scott to reschedule depositions
5-2-99	.30	Redo deposition notices
5-13-99	12.25	Defendant inspection of home, depositions, and preparation
5-16-99	.20	Review motions to compel arbitration; letter
8-6-99	.30	Letter on discovery requests
8-27-99	2.5	Respond to Motion to Compel Arbitration; Motion to Compel Discovery
8-29-99	4.5	Response to motion to compel arbitration
8-30-99	2.5	Response to motion to compel arbitration
9-7-99	4.5	Response to motion to compel arbitration
9-2-99	3.5	Response to motion to compel arbitration
9-8-99	.40	Response to motion to compel arbitration
9-14-99	1.5	Preparation and hearing on motion to compel arbitration
10-10-99	.10	Telephone with Matt White

10-16-99	.40	Enter scheduling order on calendar; letter to client
11-13-99	.40	Review letter concerning depositions of people who signed quality certificate; reply letter
11-20-99	.40	Second motion to compel
1-9-00	.50	Motion for entry of default
1-11-00	.50	Prepare witness list
2-21-00	4.5	Prepare exhibit list; review documents produced pursuant to court order; amend witness list; designation of depositions; call client; call Apex Propane
3-15-00	6.5	Preparation and travel to Opelika for deposition of Hoppe
3-14-00	.60	Prepare draft of pretrial order
3-31-00	4.5	Meet with Chesser; prepare jury charges; telephone with client; prepare voir dire
4-1-00	6.5	Inspect house with Chesser; work on jury charge; trial preparation; read and outline depositions
4-2-00	3.5	Jury charges; voir dire
4-23-00	6.5	Review depositions; deposition summaries
4-24-00	4.5	Review depositions; deposition summaries
4-28-00	3.5	Review depositions; summaries; third request for production; letter to Marty Fierman

4-29-00	3.5	Research; work on jury charges
5-4-00	.70	Review consumer complaints from state
5-15-00	.40	Telephone with Matt White; subpoena to Jamie Church; letter to Church and Chesser; letter to Marty Fierman
5-30-00	.60	Prepare deposition notices; telephone with Matt White
6-3-00	3.5	Deposition preparation
6-4-00	1.75	Deposition preparation
6-5-00	4.5	Travel to Georgia for depositions
6-6-00	12.5	Preparation for depositions, depositions and travel back to Wetumpka
6-11-00	5.25	Trial preparation; prepare time sequence chart; review videotapes
6-14-00	5.5	Trial preparation; voir dire, jury instructions
6-13-00	3.5	Read deposition of Scott [B]rooks; prepare outline of questions for [B]rooks
6-15-00	4.5	Meet with Scott and prepare for trial; visit home to look at source of water leak
6-16-00	3.5	Read depositions; prepare for trial
6-21-00	4	Trial preparation
6-22-00	3.5	Meet with Gaylan; prepare outline of question
6-23-00	3.5	Read depositions and prepare for trial; prepare examination of Sharpe and Clack; meet with Scott

6-24-00	6.5	Trial preparation
6-25-00	4.5	Trial preparation; meet with Jamie Church
6-26-00	9.6	Trial preparation and jury selection
6-27-00	12.6	Trial and preparation
6-28-00	13.75	Trial and preparation
6-29-00	13.25	Trial and preparation
6-30-00	8.75	Trial and preparation
7-3-00	.50	POST JUDGMENT DISCOVERY
TOTAL	**230.75**	

APPENDIX H

IN THE CIRCUIT COURT OF ELMORE COUNTY, ALABAMA

SCOTT BROOKS,	)	
	)	
Plaintiff,	)	CIVIL ACTION
V.	)	NO. CV-98-238
	)	
SOUTHERN MANUFACTURED HOMES INC., AND HORTON HOMES, INC.,	)	*HEARING REQUESTED*
	)	
	)	
Defendants,	)	

DEFENDANTS RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW; OR IN THE ALTERNATIVE, MOTION FOR A NEW TRIAL; OR IN THE ALTERNATIVE, MOTION TO ALTER, AMEND OR VACATE THE JUDGMENT; OR IN THE ALTERNATIVE, MOTION FOR REMITTITUR

(Filed July 28, 2000)

COME NOW the Defendants, Southern Manufactured Homes, Inc., and Horton Homes, Inc., by and through counsel, and, pursuant to Alabama Rule of Civil Procedure 50, move this Honorable Court to (a) set aside the judgment rendered in this case on June 30, 2000, and to enter judgment as a matter of law in favor of these Defendants. In the alternative, pursuant to Alabama Rule of Civil Procedure 59, these Defendants move this Honorable Court to (b) order a new trial in this case, or (c) alter, amend or vacate the judgment, or (d) order a new trial unless the Plaintiff accepts a remittitur. As grounds for said motions, these Defendants state as follows:

1. The Plaintiff's evidence was insufficient to meet his burden of proof as to each and every count of the Plaintiff's Complaint that was submitted to the jury.

2. These Defendants were and are entitled to judgment as a matter of law as to each and every count of the Plaintiff's Complaint that was submitted to the jury.

3. The Court erred in denying the Defendants' Motion for Judgment as a Matter of Law at the close of the Plaintiff's case-in-chief. (The arguments of counsel made at the time of said motion are hereby incorporated by reference.)

4. The Court erred in denying the Defendants' Motion for Judgment as a Matter of Law at the close of all of the evidence. (The arguments of counsel made at the time of said motion are hereby incorporated by reference.)

5. The Court erred in allowing the count of breach of express warranty to go to the jury.

6. The Plaintiff did not provide these Defendants with a reasonable time to cure the defects in the home as a matter of law.

7. The Court erred in allowing the count of breach of implied warranty to go to the jury.

8. The Court erred in allowing the count of breach of implied warranty to go to the jury, given that, under Alabama law, the cause of action for breach of implied warranty clearly does not apply to a manufacturer of a product. *Bryant v. Southern Energy Homes, Inc.*, 682 So.2d 3 (Ala.1996); *Ex parte General Motors Corp.*, 1999 WL 754213

(Ala. 1999); *Tucker v. General Motors Corp.*, 1998 WL 178780 (Ala. Civ. App. 1998).

9. The Court erred in allowing the count of breach of implied warranty to go to the jury given that these Defendants conspicuously excluded all implied warranties in the express warranty provided to the Plaintiff. *Morgan Building and Spas v. Gillett*, 2000 WL 264247 (Ala. Civ. App. 2000); *Money v. Willings Detroit Diesel, Inc.*, 551 So.2d 926 (Ala. 1989).

10. The Court erred in allowing the count of wanton repair to go to the jury. The count of negligent and/or wanton repair requires that the plaintiff suffer physical injury, or that the plaintiff be placed in the "zone of danger", and that the plaintiff suffer mental anguish as a result therefrom. *Ex parte Grand Manor, Inc.*, 2000 WL 337528 (Ala. 2000); *Wal-Mart v. Bowers*, 1999 WL 1100909 (Ala. 1999).

11. The Court erred in allowing the count of wanton repair to go to the jury.

12. The Court erred in allowing the count of wanton repair to go to the jury given that one cannot recover in tort for damage to the product itself when compensation for such damage may be obtained through available contractual remedies (i.e. breach of warranty). *Ex parte Grand Manor, Inc.*, 2000 WL 337528 (Ala. 2000); *Weaver v. Dan Jones Ford, Inc.*, 679 So. 2d 1106 (Ala. Civ. App. 1996); *Carrell v. Masonite Corp.*, 2000 WL 264234 (Ala. 2000); *Wellcraft Marine v. Zarzour*, 577 So.2d 414 (Ala. 1991); *Money v. Willings Detroit Diesel, Inc.*, 551 So.2d 926 (Ala. 1989); *Lloyd Wood Coal Co. v. Clark Equipment Co.*, 543 So.2d 671 (Ala. 1989).

13. The Court erred in allowing the count of violation of the Magnuson-Moss Warranty Act to go to the jury.

14. The jury's award of compensatory damages in the amount of $150,000 was excessive.

15. The measure of damages in a breach of warranty case is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted. *Ala. Code*, § 7-2-714, 1975. The Plaintiff presented no evidence regarding the difference in value at the time and place of acceptance between the value of the home accepted and the value the home would have had if it had been as warranted. Thus, it was inappropriate for the jury to return a verdict for compensatory damages. *Hubbard Bros. Construction Co. v. Brackner*, 390 So.2d 648 (Ala. Civ. App. 1980); *Harlan v. Smith*, 507 So.2d 943 (Ala. 1987).

16. The Court erred in allowing the jury to award damages for mental anguish. *Wal-Mart v. Bowers*, 1999 WL 1100909 (Ala. 1999); *White Consolidated Industries v. Wilkerson*, 737 So.2d 447 (Ala. 1999).

17. Plaintiff failed to produce substantial evidence of the kind necessary for the jury to award damages for mental anguish. *K-Mart Corp. v. Kyles*, 723 So.2d 572 (Ala. 1998).

18. Plaintiff failed to produce direct proof of mental anguish as is required for the jury to award damages for mental anguish. *K-Mart Corp. v. Kyles*, 723 So.2d 572 (Ala. 1998).

19. The jury's award of damages of approximately $138,000 for mental anguish was excessive. (The jury awarded compensatory damages in the amount of $150,000. At trial, the Plaintiff's own expert testified that it would cost approximately $12,000 to cure the problems with the Plaintiff's home. Thus, one can only assume that the jury awarded approximately $138,000 for the Plaintiff's alleged mental anguish).

20. The trial court erred in allowing the Plaintiff's attorney, over these Defendants' objections, to question these Defendants' corporate representative regarding some 185 other lawsuits that have been filed against these Defendants, most of which were lawsuits which were filed outside of the state of Alabama. *Robinson v. Kierce*, 513 So.2d 1005 (Ala. 1987); *BMW of North America v. Gore*, 517 U. S. 559 (1996).

21. The trial court erred in allowing the deposition of Bill Harpe to be read into evidence. The deposition of Bill Harpe was offered as substantive evidence that Bill Harpe falsely and/or incompletely answered discovery requests propounded to these Defendants. The discovery at issue in Mr. Harpe's deposition was ultimately provided to the Plaintiff. Yet, the deposition of Mr. Harpe gives the impression that these Defendants possibly deliberately mislead the Plaintiffs as to the discovery responses, and that the Plaintiffs had to secure the answers from some other source. This deposition was extremely prejudicial, and was not offered to impeach anyone's testimony, but rather was offered as substantive evidence in and of itself.

22. The trial court erred in denying these Defendants' motion to allow the jury to view the Plaintiff's home.

23. The Court erred in allowing the Plaintiff's attorney, in closing arguments, and over these Defendants' objections, to argue evidence relating to counts of the Plaintiffs' Complaint that had either been dismissed by the Court or withdrawn by the Plaintiff.

24. The Court erred in giving Plaintiff's requested jury charges numbered 2, 4, 5, 6, 8, 9, 10, 11, 12, 15, 38A, 41, 42, 43 and 44.

25. The Court erred in denying Defendants' requested jury charges numbered 17 and 18.

26. The Court erred in denying these Defendants' requested verdict forms, which would have required the jury to return a verdict as to each count that was allowed to go to the jury.

27. The Court erred in allowing the Plaintiff's requested verdict form, which was a general verdict form.

28. The Court erred in allowing the jury to return a general verdict as to each count of the Plaintiff's Complaint that was submitted to the jury.

29. The Court erred in allowing the Plaintiff to dismiss Defendant George Morgan, the party responsible for the set-up and delivery of the home, as a party Defendant, after the close of all evidence, but before the jury began its deliberations.

30. The Court erred on each occasion in which the Court overruled an objection by these Defendants to testimony and/or evidence offered by the Plaintiff.

31. The Court erred on each occasion in which the Court overruled an objection by these Defendants to the argument of counsel for the Plaintiff.

32. The Court erred on each occasion in which the Court sustained an objection by the Plaintiff to testimony and/or evidence offered by these Defendants.

33. The Court erred on each occasion in which the Court sustained an objection by the Plaintiff to the argument of counsel for these Defendants.

34. The jury's verdict was contrary to the great weight and preponderance of the evidence.

35. The jury's verdict was plainly and palpably wrong and unjust.

36. The verdict is so excessive and unreasonable under the evidence that it must have been rendered under the influence of bias, prejudice, and passion.

37. The Court erred in submitting the issue of punitive damages to the jury on the basis of *Ala. Code*, § 6-11-27, (1975).

38. The Plaintiff failed to establish by clear and convincing evidence that these Defendants consciously or deliberately engaged in oppression, fraud, malice or wanton conduct as is required to support an award of punitive damages. *Ala. Code* § 6-11-20, (1975). *Morgan Building and Spas v. Gillett*, 2000 WL 264247 (Ala. Civ. App. 2000); *Motion Industries, Inc. v. Pate*, 678 So. 2d 724 (Ala. 1996).

39. The jury's award of punitive damages in the amount of $600,000 was excessive. *Ala. Code*, § 6-11-21, (1975); *Hammond v. City [of] Gadsden*, 493 So. 2d 1374 (Ala. 1986); *Green Oil v. Hornsby*, 539 So. 2d 218 (Ala. 1989); *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U. S. 1 (1991); *BMW of North America v. Gore*, 517 U. S. 559 (1996).

40. The award of punitive damages in this case is unconstitutional. Furthermore, the ratio between compensatory damage and punitive damage awards, even though 1:4, was excessive given the unreasonably high amount of compensatory damages. The disparity between the compensatory and punitive damages would, of course, be greater were the improperly awarded damages for mental anguish to be excluded from the compensatory damage award.

41. Subjecting Defendants to award of punitive damages or affirming such an award in this case would amount to, and constitute, a denial of due process as afforded by the due process clause of the Fourteenth Amendment to the United States Constitution, and by the due process clause of Art I, §13 of the Alabama Constitution, as a deprivation of property without due process, or standards or criteria of due process, based upon the following grounds and circumstances, separately and severally assigned:

a. Any award of punitive damages against Defendants under the evidence in this case would necessarily be based upon an evidentiary standard no higher or more than a standard of a preponderance of the evidence, and not upon a standard of evidence beyond a reasonable doubt;

b. Under Alabama law and procedures governing the award and assessment of punitive damages, there is no objective, logical, or reasonable standard or criteria to protect Defendants against the imposition of grossly excessive punitive damages;

c. Use of the *Alabama Pattern Jury Instructions* 11.03 in instructing the jury as to the award of punitive damages, and the amount of such an award, does not provide sufficient guidance or standard for the award or amount of punitive damages;

d. Any punitive damage award would not be subject to post-trial and judicial review on the basis of objection standards and criteria;

e. The power and authority imposed upon the jury under Alabama law as to the amount of a punitive damage award is so relatively unfettered that there is lacking any reasonable or logical standard, uniformity, criteria or guidance in the assessment of the amount of the award of punitive damages;

f. Under Alabama law and procedure, there is not objective, logical or rational relationship between the award, or the amount of the award, of punitive damages and a Defendants' alleged wrongful or culpable conduct;

g. Under Alabama law and procedure, there is no objective, logical or rational relationship between the award, or the amount of the award, of punitive damages and the interests or goal of the State of Alabama referable to the imposition or allowance of punitive damages;

h. Under Alabama law and procedure, there is no objection or rational criteria for the

amount of the award of punitive damages as relates or compares to the assessment of compensatory damages, or amount of compensatory damages;

i. The Plaintiff's attempt to base punitive damages upon an alleged "pattern and practice" of conduct constitutes a constitutionally impermissible attempt to punish Defendants, in Alabama, for conduct in other states where Defendants' conduct was or is legal; such an imposition of punitive damages would not only be contrary to the Due Process clause of the Alabama and U.S. Constitutions, it would likewise be contrary to the objection of punishing specific misconduct, and would be contrary to the objection of assessing punitive damages according to culpability of conduct;

j. Under Alabama law, an award of punitive damages may be assessed against Defendants for unauthorized acts of their agent or agents without any additional requirement of knowledge or fault on the part of Defendants;

k. Under Alabama law, an award of punitive damages may be assessed against Defendants "vicariously" as a principal without any further proof of independent wrongful conduct or ratification by Defendants.

l. Alabama procedures, pursuant to which amounts of punitive damages are awarded, permit the imposition of difference [sic] penalties for the same or similar acts;

m. Under Alabama law and procedures governing the award and assessment of punitive damages, there is no objective, logical or reasonable standard or criteria which governs the

award, or the amount of the award, of punitive damages.

n. To punish these Defendants for an alleged "pattern and practice" of conduct without a conclusive finding that no further punitive damages may be awarded based upon that alleged pattern and practice violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

42. The imposition of punitive damages against Defendants for the conduct alleged in the Complaint is prohibited by *BMW v. Gore*, 116 S. Ct. 1589 (1996), and its progeny.

43. To award punitive damages against Defendants in this case would violate the Contracts Clause of Article I, Section 10 of the United States Constitution, as an award of punitive damages would impair the contractual obligations of any contracts involving the Plaintiff and Defendants.

44. The Plaintiff can not recover punitive damages against Defendants because such an award, which is penal in nature, would violate Defendants' constitutional rights protected under the Alabama Constitution of 1901, as amended (the "Alabama Constitution"), and the Constitution of the United States (the "United States Constitution"), unless Defendants are afforded the same procedural safeguards as are criminal defendants, including, but not limited to, the right to avoid self-incrimination, the right to forego production and disclosure of incriminating documents, and the right to the requirement of a level of proof beyond a reasonable doubt.

45. The Plaintiff's claim for punitive damages violates the self-incrimination clause of the Fifth Amendment to the United States Constitution, and Art. I, § 6 of the Alabama Constitution, separately and severally, in that the damages claimed are penal in nature while Defendants are required to disclose documents and/or other evidence without the safeguard against self-incrimination as provided, respectively in the United States Constitution and the Alabama Constitution.

46. Plaintiff is not entitled to recover punitive damages pursuant to *Ala. Code* §6-11-20 to 6-11-30 (1975), and thereby claim for such damages is barred.

47. To award punitive damages against Defendants in this case would violate the commerce clause of the United States Constitution by chilling and impeding Defendants from engaging in interstate commerce.

48. To award punitive damages against Defendants in this case would have a chilling effect upon Defendants' rights to open access to the courts of this State, in violation of the United States Constitution and the Alabama Constitution, separately and severally.

49. To award punitive damages against Defendants in this case would violate the excessive fines provision of the Eighth Amendment to the United States Constitution and Art. I, §15 of the Alabama Constitution.

50. Plaintiff is not entitled to punitive damages from Defendants pursuant to the facts alleged in Plaintiff's Complaint.

51. All claims for punitive damages are subject to the provisions of § 6-11-21, et.seq., *Ala. Code* (1975),

including but not limited to the statutory cap on punitive damages. See *Goodyear Tire & Rubber, Co. v. Vinson*, 1999 WL 236503, *1 (Ala. 1999) (Hooper, C.J., concurring specially). The Alabama Supreme Court's action abolishing the legislatively-created cap on punitive damages was unconstitutional and is without effect. Under the Constitution of the United States and the State of Alabama, the Alabama Supreme Court can not abolish the cap created by the Legislature on punitive damages through judicial fiat. See *Honda Motor Company Limited v. Oberg*, 114 S.Ct. 2331, N.9, 129 L.Ed. 2d 336 (1994).

52. These Defendants reserve the right to further amend these grounds in support of the above entitled motions until such time as these Defendants receive a copy of the court reporter's transcript of this case. (As of the date of this filing, the court reporter's transcript of this case has not yet been received).

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APPENDIX I

IN THE NINETEENTH JUDICIAL CIRCUIT
IN AND FOR ELMORE COUNTY
WETUMPKA, ALABAMA

SCOTT BROOKS, Plaintiff,	*	Case No. CV-98-238-F
v.	*	
SOUTHERN MANUFACTURED HOMES, INC., and HORTON HOMES, Defendants.	*	

/

REPORTER'S OFFICIAL TRANSCRIPT ON APPEAL

Proceedings taken in the above-styled cause in the Elmore County Courthouse, Wetumpka, Alabama, on June 27, 2000, before the Honorable Ben A. Fuller.

* * *

Excerpt from Record on Appeal, pp. 935-37, during oral argument on Plaintiff's Motion for Attorney's Fees and Costs:

> MR. FIERMAN [Counsel for Defendants]: That's correct. There's one other thing that I think the Court has to consider. The authority to make these awards under the Magnuson-Moss Act in relation to the warranty issue, the Court has to determine to what extent this award and all of this work relates to non-warranty issues.

THE COURT: You say that I need to separate the issues out, then, to make a determination of the case dealing with warranty and not with any wanton repair?

MR. FIERMAN: That's correct. Because there is no authorization for that.

THE COURT: Your position is I don't take the case as a whole, I peel out the piece for which attorney's fees can be awarded and deal strictly with that issue?

MR. FIERMAN: I think that's a part of your process. And that's a legitimate part of your process. What portion of all of this, and it's going to be arbitrary to a certain extent, is attributable to the Magnuson-Moss portion of this case, which is the warranty portion. With that, I rest because I don't think I can say anything else that would be helpful to the Court at this point.

MR. WHITE [Co-counsel for Defendants]: I would like to add a few things to that. Marty is right, the Magnuson-Moss Act gives rise to the attorney fees when we're talking about breach of express warranty and breach of implied warranty. But his was a case where Houston had – initially filed a nine count complaint which included the breach of warranty claims and violation of the Magnuson-Moss Act. Then it had negligent construction, wanton construction, negligent repair, wanton repair, fraudulent concealment, misrepresentation. Then he later went in and amended his complaint and added three other counts. Only four counts went to the jury. We spent a great deal of time and effort and energy throughout the litigation of the whole

case defending these other claims that ultimately went out. So you have to ask yourself, then, what percentage of his attorney's fees are related to the breach of warranty counts? Because that's the only thing that gives rise to the attorney's fees. If he wants to add on all these other counts, that great. But he shouldn't be entitled to recover attorney's fees on lost counts and on counts such as wanton construction that doesn't give rise to attorney fees. That's our position.

APPENDIX J

IN THE CIRCUIT COURT OF ELMORE COUNTY, ALABAMA

SCOTT BROOKS, PLAINTIFF, V. SOUTHERN MANUFACTURED HOMES, INC., et al., DEFENDANTS.	§ § § § § § § § §	CASE NO. CV-98-238-F

ORDER

(Filed Oct. 12, 2000)

This matter is before the Court on the Defendants' Renewed Motion for Judgment as a Matter of Law; Or in the Alternative, Motion for a New Trial; Or in the Alternative, Motion to Alter, Amend or Vacate the Judgment; Or in the Alternative, Motion for Remittitur. It is also before the Court on Plaintiff's Motion to Assess Attorney Fees and Tax Costs. Both motions were called for hearing on October 10, 2000, at 9:00 a.m. The parties were represented by their respective counsel of record and at such hearing, the Court heard substantial argument on the issues presently pending. After full and careful consideration of both motions, the Court hereby ORDERS as follows:

1. That the Defendants' motion and Renewed Motion for Judgment as a Matter of Law; Or in the

Alternative, Motion for a New Trial; Or in the Alternative, Motion to Alter, Amend or Vacate the Judgment; Or in the Alternative, Motion for Remittitur, is hereby denied.

2. That Plaintiff's Motion to Assess Attorney Fees and Tax Costs is hereby granted. An Attorney fee in the amount of $34,612.50 is hereby awarded. Costs of this action are further taxed against the Defendant in the amount of $5,340.03, all for which execution may issue.

ORDERED this 11th day of October, 2000.

/s/ Ben A. Fuller
BEN A. FULLER
CIRCUIT JUDGE

cc: All Counsel of Record

APPENDIX K

IN THE CIRCUIT COURT OF
ELMORE COUNTY, ALABAMA

SCOTT BROOKS,
PLAINTIFF

vs.

SOUTHERN MANUFACTURED HOMES, INC.; HORTON HOMES, INC.
DEFENDANTS

CIVIL ACTION NO
CV-98-238-F

(Filed Jun. 30, 2000)

Are you reasonably satisfied from the evidence that the defendants Southern Manufactured Homes, Inc. and Horton Homes, violated the Magnuson Moss Warranty Act?

X Yes
_ No

Dated this the 30 day of June 2000.

/s/ DS [Illegible]
Foreperson

IN THE CIRCUIT COURT OF
ELMORE COUNTY, ALABAMA

SCOTT BROOKS,
Plaintiff

vs.

SOUTHERN MANUFACTURED HOMES, INC., a corporation; and HORTON HOMES, INC., a corporation.
Defendants

CASE NO. CV98-238

(Filed Jun. 30, 2000)

We the jury find the issues in favor of the plaintiff Scott Brooks and against the defendants Southern Manufactured Homes, Inc., and Horton Homes, Inc., and assess the plaintiff's damages at 150,000 compensatory and 600,000 punitive.

Dated this the 30 day of June 2000.

/s/ DS [Illegible]
FOREPERSON

We the jury find the issues in favor of the defendants Southern Manufactured Homes, Inc. and Horton Homes, Inc. and against the plaintiff Scott Brooks.

Dated this the ____ day of _____ 2000.

FOREPERSON

Supreme Court, U.S.
FILED
APR 2 2002

No. 01-1273

In The Supreme Court of the United States

SOUTHERN MANUFACTURED HOMES, INC. and HORTON HOMES, INC.,

Petitioners,

v.

SCOTT BROOKS,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Alabama

BRIEF IN OPPOSITION FOR RESPONDENT

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REASONS FOR DENYING THE WRIT

I. HORTON NEVER ARGUED TO ANY STATE COURT THAT ITS CERTIFICATE OF QUALITY ASSURANCE IS NOT A WRITTEN WARRANTY.

A. Horton Did Not Preserve the Issue of Whether Its Certificate of Quality Assurance is a Written Warranty.

Horton argues that the Alabama Supreme Court erred by holding that the Certificate of Quality Assurance is a written warranty under the Magnuson Moss Act. Under Supreme Court Rule 14.1(g)(i), Horton was required to state in its petition "when the federal questions sought to be reviewed were raised [and] the method or manner of raising them . . . ." *See Adams v. Robertson*, 520 U.S. 83, 89 n.3 (1997).

Horton's Statement of Facts does not contain this information. Horton argues, "Plaintiff never alleged at trial, and never argued on appeal, that the 'Certificate of Quality Assurance' amounted to a written warranty under the Magnuson-Moss Warranty Act. The Supreme Court of Alabama made this finding on its own behalf." Pet. at 9 n.8.

Notwithstanding this, Horton was required to present, *at some point*, its contention that the Certificate of Quality Assurance is not a written warranty. Horton could have preserved this issue in its Application for Rehearing. *See, e.g., Herndon v. Georgia*, 295 U.S. 441, 444 (1935) ("[T]he federal claim was timely if the ruling of the state court could not have been anticipated and a petition for rehearing presented the first opportunity for raising it.").

Yet, Horton does not allege that it *ever* presented this issue to any Alabama court, and the opinion of November 30, 2001, does not reflect that Horton raised the issue on rehearing. Horton now seeks to raise an issue that it never raised in any state court. This it may not do. *See In re Estate of Wilson*, 439 U.S. 877, 879 (1978).

B. The Alabama Supreme Court Correctly Held that the Certificate of Quality Assurance Is a Written Warranty.

Under section 2301(6) of title fifteen, a writing delivered in connection with the sale of a consumer product is a "written warranty" in three circumstances:

> (1) if it "affirms or promises that such material or workmanship is defect free," or
>
> (2) if it "affirms or promises that such material or workmanship . . . will meet a specified level of performance over a specified period of time," or
>
> (3) if it contains an "undertaking in writing . . . to refund, repair, replace or take other remedial action . . . . "

See 15 U.S. C. § 2301(6).

The Certificate of Quality Assurance is a written warranty for two reasons. First, it states that "your new home has been *carefully inspected* to ensure quality and cleanliness." Pet., App. F, at 1f. This statement "affirms . . . that such material or workmanship *is defect free*." In *Marine Midland Bank, N.A. v. Carroll*, 471 N.Y.S.2d 409, 98 A.D.2d 516 (1984), the court held that a

"Dealer's Pre-Delivery Inspection Requirements" form was a written warranty under the Magnuson Moss Act.

Second, by stating that the home is "built for a lifetime," the certificate "affirms or promises that such material or workmanship . . . will meet a specified level of performance *over a specified period of time*." The Federal Trade Commission has recognized that the word "lifetime" is a reference to the duration of a warranty. *See Rules, Regulations, Statements and Interpretations under the Magnuson Moss Warranty Act*, 49 Fed. Reg. 60168, 60181-82 (1975); 16 C.F.R. § 239.4 (2001); *cf. Skelton v. General Motors Corp.*, 660 F.2d 311, 316 n.7 (7th Cir. 1981) ("[A] representation that a 'transmission would perform like a THM transmission *for the life of the transmission*' would constitute a 'written warranty.'"), *cert. denied*, 456 U.S. 974 (1982).

C. Horton Issued a Written Warranty and Was thereby Prohibited from Disclaiming Implied Warranties.

Without regard to whether the Certificate of Quality Assurance is a Magnuson-Moss warranty, the petition shows on its face that Horton issued a written warranty, Pet., App. D, at 20d. Under the express language of section 2308(a) of title 15, this warranty rendered Horton's disclaimer of implied warranties ineffective.

The practice of issuing a limited warranty while simultaneously disclaiming implied warranties, such as Horton did, is one of the primary evils that the Magnuson Moss Act was designed to remedy:

> [T]he bill is designed to insure consumers certain basic protections when they purchase

> consumer products which have written warranties.... The issuance of a limited warranty while simultaneously disclaiming implied warranties has become an increasingly common practice which results in many cases in a document which could be more accurately described as a limitation on liability rather than a warranty. *Therefore, there is a need to prohibit the disclaimer of implied warranties when a supplier of consumer products guarantees his products in writing.*

Sen. Rep. 93-151, 93d Cong., 1st Sess. 7; *see* 119 Cong. Rec. 968 (1973) (similar remarks by Congressman Magnuson in introducing the bill); *Final Action Concerning Review of Interpretations of Magnuson-Moss Warranty Act*, 64 Fed. Reg. 19700, 19704 (1999) ("Protection of the consumer's implied warranty rights is the bedrock of the Magnuson-Moss Warranty Act regulation scheme.").

II. HORTON NEVER ARGUED TO ANY STATE COURT THAT FEDERAL LAW REQUIRED FINDINGS OF FACT OR THAT FEDERAL LAW EXCUSED IT FROM OBJECTING TO SPECIFIC PORTIONS OF PLAINTIFF'S FEE REQUEST.

A. Horton Did Not Preserve the Issue of Whether the Alabama Supreme Court Improperly Deemed the Fee Request Uncontroverted.

The Alabama Supreme Court held that Horton had not preserved the issue of whether the fee award was excessive, stating, "Horton Homes bore the burden of objecting to specific items or charges for amounts of

work that it considered improper, and when it declined to identify any work or expense that it considered unnecessary, the trial court could properly treat those amounts as uncontroverted."[1] Pet., App. A, at 20a. Failure to preserve an error is an adequate and independent ground for a state court judgment. *Adams v. Robertson*, 520 U.S. 83, 87 (1997).

Horton argues, however, that federal law prohibited the Alabama Supreme Court from requiring it to object to specific items in the fee request. Pet. at 18. The Alabama Supreme Court did not address this argument, and Horton does not allege that it ever presented this argument to any Alabama court. Thus, this issue is not preserved for review. Sup. Ct. R. 14.1(g)(i); *Adams v. Robertson*, 520 U.S. 83, 86-88 (1997).

B. Horton Failed to Preserve the Issue of Whether Federal Law Required the Trial Court To Make Findings of Fact.

Horton further contends that the trial court erred by failing to make written findings of fact on the plaintiff's fee request. Pet. at 20. The Alabama Supreme Court did not address this argument, and Horton has

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[1] Horton disclaimed any contention that counsel had padded his hours, stating, "I don't believe there's any question that Houston Howard applied that much time on an hourly basis to this case. Mr. Howard is not going to come into this court and pad his time records or his hourly rate or the expenses. That's not an issue here." (R. 930). When the court asked Horton's counsel, "You don't contend that any of those depositions or any of the discovery was inappropriate under the allegations of the case," Horton's counsel refused to identify any discovery that it thought was unnecessary. (R. 932-33).

not alleged that it raised this issue in any Alabama court. Sup. Ct. R. 14.1(g)(i); *Adams v. Robertson*, 520 U.S. 83, 86-88, 89 n.3 (1997). Thus, this issue is not preserved for review.

Moreover, although the court in *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983), said that "the *district court* [should] provide a concise but clear explanation of its reasons for the fee award," the award was not made by a *district court*. Unlike the *Federal Rules of Civil Procedure*, the *Alabama Rules of Civil Procedure* do not ordinarily require trial courts to make written findings of fact. *Compare* Fed. R. Civ. P. 52(a) & 54(d)(2)(C) *with* Ala. R. Civ. P. 52(a) & 54. Nothing in *Hensley* requires *state courts* to make findings of fact, and nothing in the Magnuson Moss Act requires such findings.

C. The Trial Court Did Not Abuse Its Discretion in Finding that the Plaintiff's Different Claims Were Not Distinct in All Respects.

A court is not required to reduce a fee request simply because a plaintiff failed to prevail on every issue raised:

> Much of counsel's time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis. Such a lawsuit cannot be viewed as a series of discrete claims. Instead the district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation.

> Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee. *Normally this will encompass all hours reasonably expended on the litigation,* and indeed in some cases of exceptional success an enhanced award may be justified. In these circumstances the fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit. Litigants in good faith may raise alternative legal grounds for a desired outcome, and the court's rejection of or failure to reach certain grounds is not a sufficient reason for reducing a fee. The result is what matters.

Hensley v. Eckerhart, 461 U.S. 424, 435 (1983).

In refusing to reduce a fee request, the court in *Drouin v. Fleetwood Enterprises,* 209 Cal. Rptr. 623, 627, 163 Cal. App. 3rd 486 (Cal. App. 3rd Dist. 1985), said, "Plaintiffs' complaint clearly discloses that all of her causes of action were related to her purchase of the motor home from defendant and her subsequent efforts to obtain repairs of its defects." *Accord, Chrysler Corp. v. Weinstein,* 522 So. 2d 894, 896 (Fla. App. 3rd Dist. 1988); *Fleetwood Motor Homes of Pennsylvania, Inc. v. McGehee,* 182 Ga. App. 151, 355 S.E. 2d 73 (Ga. App. 1987); *Universal Motors, Inc. v. Waldock,* 719 P.2d 254 (Alaska 1986).

Horton did not identify for the trial court, and has not identified here, any work for which plaintiff's counsel should not have been compensated. The trial court did not abuse is discretion in determining that the plaintiff's claims for negligent/wanton construction, negligent/wanton repair, and fraud were not "distinct in all respects from [the plaintiff's] successful claims." 461

U.S. at 439. In this case as in *Drouin,* all of the plaintiff's "causes of action were related to [his] purchase of the . . . home from defendant and [his] subsequent efforts to obtain repairs of its defects." 209 Cal. Rptr. at 627. This is sufficient to sustain the trial court's action.

III. THE ALABAMA SUPREME COURT CONDUCTED MEANINGFUL REVIEW OF THE PUNITIVE DAMAGE AWARD, REDUCING THE AWARD FROM $600,000 TO $150,000.

A. Horton Did Not Preserve the Issue of Whether the Constitution Required the Trial Court To Make Written Findings of Fact.

Horton argues, "For some unknown reason, however, the Alabama Supreme Court in this case did not remand to the trial court pursuant to *Hammond* even though these petitioners urged it to do so." Pet. at 28. Horton has not cited any portion of the record showing how it raised this alleged constitutional error. Sup. Ct. R. 14.1(g)(i); *see Adams v. Robertson*, 520 U.S. 83, 89 n.3 (1997).

The Alabama Supreme Court opinion makes no reference to Horton's alleged contention that the court should have remanded the case for findings of fact. "When the highest state court is silent on a federal question before us, we assume that the issue was not properly presented." *Adams*, 520 U.S. at 86.

Under Alabama law issues not raised in an appellant's initial brief are waived. *Goodyear Tire & Rubber Co. v. Washington*, 719 So. 2d 774, 778 (Ala. 1998); *Kennesaw Life & Acc. Ins. Co. v. Old Nat'l Ins. Co.*, 291 Ala.

752, 754, 287 So. 2d 869, 871 (1973) (court will not consider issue first raised in reply brief). Horton's initial brief failed to argue that the trial court's order was deficient because it contained no written findings of fact. Thus, this issue was waived.

B. Horton Had No Constitutional Right to Written Findings of Fact.

Horton argues, "[T]he trial court did not reflect in the record its reasons for refusing to cut the punitive damage award, and made no findings whatsoever regarding the *Gore* and *Green Oil* factors." Pet. at 28. Although the trial court made no written findings, it held a lengthy hearing where it considered the relevant factors. (R. 910-27). In *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 466 (1993), this court said, "We certainly are not prepared to characterize the trial judge's failure to articulate the basis for his denial of the motions for judgment notwithstanding the verdict and remittitur as a constitutional violation." That same reasoning applies here.

C. Horton Received Meaningful Appellate Review.

Finally, Horton contends, "Nor did the Alabama Supreme Court conduct any type of *meaningful* review of the punitive award." Pet. at 28. The record contradicts this assertion; the court reduced the punitive award from $600,000.00 to $150,000.00. The right to meaningful appellate review does not entail the right to a written opinion. *Cf. Great Northern Railway Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 363 (1932) ("There

would certainly have been no denial of due process if the court, in affirming the judgment, had rendered no opinion. . . . ").

This court has recognized two constitutional grounds for challenging punitive damages awards. First, a tortfeasor is entitled to reasonable notice of the sanction that may be imposed. *BMW of North America, Inc. v. Gore,* 517 U.S. 559, 584-85 (1996). Second, "[t]he Due Process Clause of the Fourteenth Amendment prohibits a State from imposing a 'grossly excessive' punishment on a tortfeasor." *Id.* at 562.

"[T]he notice component of the Due Process Clause is satisfied if prior law fairly indicated that a punitive damages award might be imposed in response to egregiously tortious conduct." *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 465-66 (1993). Prior decisions gave Horton notice that a mobile home manufacturer may receive a substantial sanction for wrongful conduct. *See Vintage Enterprises, Inc. v. Jaye*, 547 So. 2d 1169 (Ala. 1989) (affirming $500,000 punitive damage award against mobile home manufacturer), *cert. denied*, 493 U.S. 959 (1989).

As to the amount of the sanction, the decision in *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991), disposes of any argument that the sanction itself is unreasonably large. There, this court affirmed what it viewed as a likely punitive damage award of $840,000, based on an economic loss of less than $4,000, and a likely mental anguish award of $196,000. *Id.* at 8, n. 2, & 23-24. Although the Alabama Supreme Court determined that Brooks' economic loss was $12,000, and his

total loss $150,000, Pet., App. A, at 26a, the court reduced the punitive damages to only $150,000.

Last, Horton states, "The bottom line in this case is that Horton has asserted from the beginning that punitive damages were unwarranted in this case. . . . To date, there has been no finding by any court as to what Horton did or failed to do to warrant the imposition of punitive damages." Pet. at 30. The Alabama Supreme Court opinion does not address Horton's alleged contention that the evidence did not warrant an award of punitive damages. Again, this issue was not properly presented to the Alabama Supreme Court; Horton failed to file any Motion for Judgment as a Matter of Law on the plaintiff's claim for punitive damages during trial.

CONCLUSION

For the reasons stated above, the petition for certiorari should be denied.

Respectfully submitted,

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